114-549

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~605~~. 272

THE MARTINSBURG & POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES MARCH.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED SEPTEMBER 25, 1882.

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1 UNITED STATES OF AMERICA, *ss.*

In the District Court of the United States for the District of West Virginia, at Clarksburg: Pleas held before the Honorable John J. Jackson, judge of the District Court of the United States for the District of West Virginia, at Clarkesburg, on Thursday, the 22d day of December, A. D. 1881.

Be it remembered, that heretofore, to wit, on the 30th day of June, A. D. 1877, came James March, by his attorney, and sued out of the clerk's office of said district court a writ of summons, which writ, with the return thereon endorsed, is in the words and figures following, to wit:

The President of the United States of America
to the Marshal of the District of West Virginia, greeting:

You are hereby commanded to summon the Martinsburg and Potomac Railroad Company, a citizen of the State of West Virginia, and of the judicial district thereof, if it be found in your district, to appear before the judge of the District Court of the United States for the District of West Virginia, at Clarksburg, at rules to be held in the clerk's office of our said court on the first Monday in July next, to

2 answer James Marsh, a citizen and resident of the State of Maryland, of a plea of trespass on the case in assumpsit, damages fifty thousand dollars, and have then there this writ. Witness, John J. Jackson, Jr., judge of the District Court of the United States for the District of West Virginia, at Clarksburg, this 30th day of June, Anno Domini 1877, and in the 101st year of the Independence of the United States of America.

[L. S.] (Signed) JASPER Y. MOORE,
Clerk U. S. D. C. D. W. Va.

(Return.)

Served the within summons on the within-named Martinsburg and Potomac Railroad Company, on the 2d day of July, 1877, by delivering an office copy thereof to Charles J. Faulkner, Jr., to the treasurer and secretary of said company, in Martinsburg, in the county of Berkley, where he resides, and which is the principal office of the said company, neither the president or other chief officer being a resident of or found in said county.

(Signed) WM. R. ALEXANDER, *Deputy*,
for G. W. PATTON, *U. S. M.*

And at another day, to wit, at rules held in the clerk's office of the District Court of the United States for the District of West Virginia, at Clarksburg, on the first Monday in July, A. D. 1877, came the plaintiffs, by his attorney, and filed his declaration against the said defendant, which declaration is in the words and figures following, to wit:

3 UNITED STATES OF AMERICA, *to wit:*

In the District Court of the United States for the District of West Virginia.

James March, a citizen and resident of the State of Maryland, complains of the Martinsburg and Potomac Railroad Company, a citizen of the State of West Virginia, of a plea of trespass on the case in assumpsit; and thereupon the plaintiff says that heretofore, to wit, on the 29th day of December, 1870, at the county aforesaid, by a certain agreement in writing then and there made between the plaintiff of one part and the said defendant of the other part, it was witnessed, among other things, that the said plaintiff, for the consideration thereinafter mentioned, did thereby promise and agree to and with the said defendant that he would furnish all the material required, which should be of a sound, durable, and good quality, and approved by the chief engineer in the employ of the said defendant, and employ all the labor necessary to construct in a good and workmanlike manner the grading and masonry for the section between Powell's Bend and Martinsburg, of the Martinsburg and Potomac Railroad—the construction of said section to be in accordance with the following specifications of the manner of constructing the general work: Grading and masonry, clearing and grubbing timber

4 from the place required for the excavations for said railroad, and for the foundations of culverts and other appurtenances for said railroad. All trees, bushes, and roots were to be cut and grubbed up, and, together with the logs, brushes, and wood, were to be removed from the ground and so disposed of as to do no unnecessary damage to the adjoining lands, as might be directed by the chief engineer. It was understood, however, that roots were not to be grubbed for the foundation of embankments when the natural surface of the ground was more than four feet below the grade level and of such solidity as not to require excavations for the foundations. In such case the trees were to be cut close to the ground and removed as before specified. When directed by the said engineer, all vegetable or perishable matter was to be excavated from a space of such width as would be required under the embankments, and removed into the outside the banks, or, if directed, beyond the limits of the banks, and said work should always be 100 feet in advance of the embankments—excavations for the foundations of culverts and other structures for side draining, for channels to conduct water of streams or land floods to or from culverts, or to change the course of streams, and for the approaches of road that may cross or pass alongside of said railroad, and for sidings, branches, depots, grounds, water

5 stations, and all other excavations that may be connected with or incident to the construction of said railroad, was to be performed in all respects as might be directed by said engineer. In all cases when the grade line of the said road passed below the natural surface of the earth, or where material was wanted for embankments, the same was to be excavated in the manner described

below. Earth cutting, when required for the prism of the railroad, the earth was to be excavated to the grade level, true and even to a width of not less than 15 feet nor more than 10 feet each way from centre line of railroad, with such slopes as might be directed by said engineer. When the natural soil or earth immediately below the grade level was not suitable for a road-bed, it was to be excavated to such additional depth as said engineer might direct. All the material on the section excavated from earth cuttings, except stones suitable for walls or foundation, as hereinafter specified, was to be deposited and used in the foundations of embankments on the same section. The embankments, except in cases where it might be otherwise directed, was to be raised to grade level of the railroad, and be formed to such width and slopes as said engineer should direct. When the quantity of material taken from any ex-
6 cavation should be greater than required to make the embankment of the usual width, the surplus was to be deposited on one or both sides of the embankment in such manner as to increase their width uniformly, or in such manner as the said engineer should direct. In cases where the quantity of material furnished by the excavations upon the section should not be sufficient for the foundations of the requisite embankments, the deficiency was to be supplied by material taken from the adjoining grounds, at such places as the said engineer might designate, or from an enlargement of the excavation, made in a regular and even form with proper slopes, as said engineer might direct. Foundation walls were to rest upon the rock, and be laid dry, and the style of workmanship was to be such as was usually required for good slope walls, well bounded and laid in a compact and substantial manner, and, so far as might be required by said engineer, the beds of the stones were to be laid at right-angles to the face of the wall. The protection wall was to be carried forward of the embankments.

Culverts.—Those of not more than 2 feet in width of opening was to be rectangular or box culverts. They were to be covered with rough-dressed flag stones, to be not less than six inches in thickness, two feet nine inches in length, and eighteen inches
7 wide. Culverts of four feet and over in space or width were to be arched. The abutments, piers, arches, spandules, parapets, and wing walls to conform to the plan that might be furnished by the engineer. The masonry to be laid in a neat and compact manner and wall bounded; no stone to be used in the face that was less than 10 inches thick, 20 inches long, and that would not bed 12 inches in the wall. Stone in all cases to be laid on their broadest bed, and no stone to have more height than bed. The arch stone was to generally to have such depth as to lay the full thickness of the arch, and their beds conform to the radii of the arch. Coping stone to be got out in such form as would allow the upper surface to be in fair line with vertical joints of not more than half an inch in width; no stone to be less than nine inches in thickness nor have a superficial area of less than six feet. The culvert masonry

was to be laid in mortar composed of the best hydraulic cement and two parts of clean sand, and no mortar that had been made more than one hour should be put in the masonry.

Bridge masonry was to be composed of abutments and supporting walls. The face and other stones to be sound and compact, and of a quality to endure the frost and sun, such as should be approved by the engineer. They were to be laid upon their natural beds and fitted to their places before they were brought upon the wall, and in order that the stone be properly laid, cranes should be
8 used in handling them upon the walls and in laying them. All the face stones were to be well hammer-dressed on their faces and in their joints; in other words, the bed and the joints and the face were to fill the square, and be as complete as the beds, joints, and face of cut stone in every respect, except the face being hammered instead of cut. There was to be a header, or bond stone, four feet long for every ten feet in length, on such cornice, measured from centre to centre of the headers. The headers of any corner was to divide as nearly as possible the spaces between the headers below. No course was to be less than 10 inches in thickness, and no stretcher was to have less than 12 inches bed. No smaller course was to precede a larger. The thicker courses were to be laid at the bottom. The stretchers were to be not less than three feet long, and their ends were not to make and even and full joint of more than 9 inches in from the face of the wall; when said engineer might direct, 18 inches of the face of the whole wall was to be laid in mortar, the same as provided for in culverts. If arches were required in any bridge masonry, the work was to be done in conformity to the specifications for similar work in culverts. In all fillings around masonry and other walls, care was to be taken to use as far as possible small stones, spalls, quarry chips, gravel, or such other
9 material as should be approved by said engineer, and so to arrange them as to lessen the pressure of earth against the walls and also to facilitate the escape of water that might otherwise be retained to the prejudice of the masonry. No hydraulic cement was to be used until it had been tested and approved by the said engineer.

All masonry was to be carried up in a regular manner, and leveled off in corners of not more than 18 inches in height, if required by said engineer. Stone used in the masonry was to be of a sound and durable quality and free from dirt. It was mutually agreed that the said company should furnish the right of way over the said section of railroad, and make compensation to land owners for all excavations provided for in said agreement that might be required for the work. It was agreed that no public or private road that crossed or intersected the line of said railroad or its appurtenant works should be obstructed by excavations or otherwise until directions should be given by said engineer to complete the railroad across said road or highway; nor were any crops of grain or grass or vegetables, nor fruit trees, nor dwelling houses, or other buildings

on said line of railroad to be disturbed unless by direction of said engineer. The said plaintiff was to be responsible for all damage done to premises through which the line of said section of railroad ran, in consequence of leaving gates or fences open, and also
10 for all depredation on wood fences or other property by workmen in his employ, or by blasting rock so as to injure buildings or other property; and no estimate of work was to be furnished by said engineer until all damages of this description were settled or provided for to his satisfaction. And the plaintiff further agrees to perform the several stipulations of said agreement by himself and workmen under his immediate superintendence, and not by a sub-contractor, except it be with the written approbation of the said engineer; and it was further agreed that if at any time any overseer or workmen employed by said plaintiff should be unfaithful, incompetent, or should have made exertions to produce disturbance on this or any other contract on the said railroad, the plaintiff should, on being required by said engineer, forthwith discharge such person, and not employ him on the work; nor should the said plaintiff employ any other person who had been dismissed for similar causes on any part of the line of said road; and the said plaintiff agreed that he would perform the work under said agreement as before specified, but any alterations in the form, dimensions, or material of said work which might be directed in writing by said engineer should be made by said plaintiff as directed. And if in the opinion of said engineer it would be expedient to dispense with the whole or any part of the work thereby contracted for, the
11 plaintiff, on receiving directions, should discontinue any arrangements or progress on the work so directed to be dispensed with; but the plaintiff should be entitled to such compensation as said engineer might estimate to be just and reasonable for any outlay or progress he might have made for work so dispensed with. It was further agreed that if in the opinion of said engineer it should be expedient to make alteration in the location of the line of road on said section, the plaintiff was to conform to such alterations; but if the work should be rendered thereby more expensive in kind, he should be entitled to such extra compensation as said engineer should estimate to be just and reasonable; and if such alterations should make the work less expensive in kind, then a deduction should be made as said engineer might estimate to be just and equitable. To prevent all disputes it was mutually agreed that the said engineer should in all cases determine the amount or quantity of the several kinds of work which were to be paid under said agreement, and the amount of compensation at the rates therein provided for, and also that the said engineer should in all cases decide every question which could or might arise relative to the execution of said agreement on the part of said plaintiff, and his estimate shall be final and conclusive. It was further agreed that all the excavations should be estimated as excavations, and the price paid for ex-
12 cavations should include all expenses for depositing the same so provided for in the preceding specifications, except stone

that might be used in the construction of walls. All excavations were to be included under two heads, namely, earth excavations, which included all except rock, and rock excavations, which included all ledges of sound rock and rock boulders measuring not less than a half a cubic yard. The compensation for arches was to include all expenses for the carting and removal of the same after the work was done. It was further agreed that in calculating the quantity of masonry, walling, and excavations, the most rigid geometrical rules were to be applied thereto, any custom to the contrary notwithstanding. And the said defendant did thereby on its part in the said article of agreement engage that whenever the said contract should be wholly completed on the part of the said plaintiff, and the said engineer should have certified the same, they would pay for the work as follows: For the excavation of earth, which includes clay, gravel, &c., 30 cents per cubic yard; for solid rock, $1.30 per cubic yard; for loose rock, 50 cents per cubic yard; for slate rock, 75 cents per cubic yard; for embankment, 30 cents per cubic yard; for bridge masonry, $7.00 per perch of 25 cubic feet; for culvert masonry, $7.00 per perch of 25 cubic feet; for dry drains, $3.50 per perch of 25 cubic feet; for vertical walls, $3.50 per perch of 25 cubic
13 feet; for slope wall, $3.50 per perch of 25 cubic feet. In order to enable the plaintiffs to prosecute the work advantageously, the said engineer was to make an estimate from time to time (not oftener than once a month as the work progressed) of the work done; the said estimate should not be required to be made by strict measurement on unfinished work, but by measurements and estimating, so as to obtain an approximate result and its value under said agreement as compared with the whole contract; but it should not be required of said engineer to measure at all for work that was in an irregular form, but might estimate on his judgment of the value of the same, nor should it be required to make an estimate oftener than once in each and every month after work had commenced; the said defendant agreed in said article of agreement to pay to the plaintiff in current money within 20 per cent. of the amount of said estimate, on presentation. And it was further agreed that if in the opinion of said engineer the plaintiff should neglect or refuse to prosecute the work embraced in said contract with sufficient energy to insure its completion within the time specified in the same, or perform the work in an improper manner, the said engineer might certify the same to the Board of Directors of the said company, and thereupon the said directors might declare the said contract abandoned
14 by the said plaintiff, and might proceed to contract for the work with any other person. On abandonment of said contract, as aforesaid, the plaintiff should forfeit to the said defendant any money that might remain due and unpaid at the time. And the said plaintiff further agreed that the work contracted for as aforesaid should be commenced within 20 days after being required by the defendant or the said engineer, and that the said contract should be fully completed on the part of the plaintiff by the first day of April,

1872, and sooner if practicable; and it was further agreed that whenever the said contract should be completely performed on the part of the said plaintiff, and the said engineer should certify the same in writing under his hand, together with his estimate as aforesaid, the said defendant should, within 30 days after the receipt of such certificate, pay to the plaintiff in current notes the sums which, according to said agreement, should be due; provided, however, and it was so distinctly understood and agreed, that the said defendant might pay to the said plaintiff two-fifths, or 40 per cent., of every estimate, which it was required and called upon to pay in bonds of the county of Berkley aforesaid, to be taken and received by the plaintiff at their par value. And the said agreement being so made as aforesaid, afterwards, to wit, on the day and year first aforesaid, in con-
15 sideration thereof, and that the said plaintiff at the special instance and request of the said defendant had then and there undertaken and faithfully promised the said defendant to perform and fulfill the said contract in all things on his part and behalf to be performed and fulfilled, the said defendant undertook and then and there faithfully promised the said plaintiff to perform and fulfill the said contract in all things on its part and behalf to be performed and fulfilled. And the said plaintiff saith that he entered upon the said work at the time provided for in said contract, and that in the prosecution and completion of said work under said agreement, he furnished all the material, (which was of a sound, durable, and good quality,) and performed all the labor and finished in every respect in the most substantial manner the grading and masonry for the section between Powell's Bend and Martinsburgh of the said railroad, and that in accordance with the specifications contained in said agreement, he performed the general work of grading and masonry, clearing and grubbing, and in all things complied with the conditions of said contract on his part; and the plaintiff avers that in the prosecution and completion of said work, he performed labor and furnished material, which was accepted by the said defendant through its said engineer, to the amount of $222,967.03, as will be
16 shown by four itemized bills of account hereto attached, marked A, B, C, and D, and made a part of this declaration; and the said plaintiff saith that although he has always performed and fulfilled all things in the said agreement mentioned on his part and behalf to be performed and fulfilled, yet the said defendant has not performed, fulfilled, or kept anything in the said agreement contained on its part and behalf to be performed, fulfilled, or kept according to the tenor and effect of said agreement, and its said promises and undertakings.

And the said plaintiff saith, that by reason of the premises the aforesaid sum of money, to wit, $222,967.03, became due and payable to the said plaintiff as and for the aforesaid labor and material by him performed and provided under said agreement as aforesaid. Yet the said defendant, not regarding the said promises and undertakings, hath not as yet paid the said $222,967.03, or any part thereof,

5,919 perches bridge masonry, $7.00		$41,433 00
2,232 " dry masonry, $3.50		7,812 00
17,191 " ballast, $1.00		17,191 00
20 Expenses county road, grading		2,380 68
		$198,075 93
Extra price for evacuation of bottom of rock cutting at Powell's Bend, 2,400 c. yards solid rock, @ 80 c. per yd.		1,920 00
Extra price for pier masonry, 279 perches pier masonry, at $7.00 per perch		1,953 00
		$3,873 00
Final return of work done on the extension of the Martinsburg & Potomac Railroad from the B. & O. R. R. to Raleigh street, Martinsburg, 3,200 cubic yds. of earth, at 30 cts		960 00
1046 cubic yds. solid rock, $120		1,255 20
500 perches bridge masonry, at $7.00		3,500 00
876 " ballast, at $1.00		676 00
Amount		$6,391 20

Total amount, $208,340.13."

(*Account "C," referred to in said Declaration.*)

"Martinsburg and Potomac Railroad Co., to James March, Dr.

1871.		
April.	To men and teams removing ballast, and grading at Myers', by order of company's engineers	$352 37
"	Men and teams making approaches to county-road bridge at Reynold's	852 87
		$1,203 06"

(*Account "D," referred to in said Declaration.*)

"	13 culverts, rough stone	1,015.1	perch
	1 French drain, rough stone	19	"
21	Bedington Bridge, dressed stone	817	"
	513 ft. ballast, spalls, &c.,	205.2	"
$133.70.		2,056.3	perches."

And the defendant not appearing, on motion of the plaintiff it is ordered that judgment be entered for the said plaintiff against the said defendant for what damages the plaintiff ought to recover, unless the said defendant shall appear and plead to issue at the then next rules.

At which day, to wit, at rules held in the clerk's office of the District Court of the United States for the District of West Virginia, at Clarksburg, on the first Monday in August, A. D. 1877, the defendant still failing to appear, on motion of the plaintiff, by his attorney, it was ordered that the conditional judgment entered in this cause at the last rules stand confirmed, and that the plaintiff's damages be ascertained by a jury at the next term.

And at another day, to wit, at a District Court of the United States for the District of West Virginia, continued and held on Friday, the 5th day of October, A. D. 1877, came the defendants, by their attorneys, and on their motion the judgment entered in the office in his cause is set aside; and thereupon the defendants, by their attorney, demur generally to the declaration filed in this cause
22 and each count thereof, and the plaintiff joins in the said demurrers, and the defendants for plea say that they did not assume and promise as the plaintiff in his declaration against them hath alleged, and of this they put themselves upon the country, and the plaintiff doth the like; and the defendants here suggest that the plaintiff is not a resident of this State, and that security for costs be required of him.

And on motion of the defendants it is ordered that this cause be continued until the next term, but this continuance is at the costs of the said defendants.

And at another day, to wit, at a term of said court held at the place aforesaid, on Friday, the 12th day of April, A. D. 1878, came the parties, by their attorneys, and the matter of law arising upon said demurrers being submitted to the court, it is considered by the court that said demurrers be overruled; and the defendant here tendered a special plea in writing, to the filing of which the plaintiff, by his counsel, objects, and this cause is continued until the next term.

And at another day, to wit, at a District Court of the United States for the District of West Virginia, continued and held at Clarksburg, on Wednesday, the 9th day of October, A. D. 1878, came the parties, by their attorneys, and the court having fully heard the arguments of counsel upon the special plea in writing heretofore tendered in this cause, and duly considered the same, is of
23 opinion that said special plea be rejected and not permitted to be filed.

And at another day, to wit, at a term of said court held at the place aforesaid, on Thursday, the 10th day of October, A. D. 1878, came the parties, by their attorneys, and the defendant here filed two special pleas in writing, marked, respectively, Nos. "1" and "2," to which pleas the plaintiff replies generally, and issue is thereon joined; and said defendant also filed a specification of setts-off as part of said plea No. 2, which they desire to prove on the trial of this cause; and the plaintiff also filed an additional bill of particulars; and thereupon came a jury, to wit, Isaac Snyder, E. F. Moore, A. H. Beach, P. H. Gallagher, Harden Kuhn, Nathan M. Jones, John Hickey, John Flesher, Milton Wells, H. M. Ice, Thomas S. Spates,

and David Eagan, all good and lawful men of this judicial district, who, being duly sworn to well and truly try the issue in this cause, and having partly heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning at 9 o'clock.

(*Special Plea No.* "1," *above referred to.*)

"THE MARTINSBURG & POTOMAC R. R. CO.
ads.
JAMES MARCH. } In Assumpsit.

And for a further plea in this behalf, the defendant comes and
24 defends, &c., and says that the plaintiff ought not to have or maintain his action aforesaid against this defendant, so far as the items set forth in his bill of particulars are not embraced in the contract declared upon in his first count, because he says that said accounts and the items thereof are barred by the statute of limitations prescribing five years for the prosecution of such accounts, the said cause of action having occurred more than five years before the institution of this suit, and this the said defendant is ready to verify; wherefore he prays judgment."

(*Special Plea No.* "2," *above referred to.*)

"The defendant files with his plea in this cause specifications of payments and setts-off, marked (A,) and gives notice that he will claim under his specifications of payments and setts-off that his payments exceeds the plaintiff's demand in the sum of $8,573.20, as will more particularly appear by a paper here filed, called the final estimate of the engineer, as a part of his bill of particulars in this case.

25 Memorandum of payments make by the Martinsburg and Potomac R. R. Co. to James March, to be filed with the defendant's plea of payment:

	Bonds of Co. B.	Cash.	Aggregate.
Feb. 15th, 1871	$2,000 00	$3,333 76	$5,333 36
March 15th, 1871	4,000 00	6,035 70	10,035 70
April 15th, 1871	5,000 00	9,000 00	14,000 00
May 15th, 1871	6,000 00	7,418 32	13,418 32
June 15th, 1871	6,000 00	7,223 98	13,223 98
July 15th, 1871	5,500 00	8,440 45	13,940 45
Aug. 15, 1871	6,500 00	10,619 25	17,119 25
September 6th, 1871	7,000 00	9,456 85	16,456 85
Oct. 15th, 1871	6,500 00	9,306 15	15,806 15
Nov. 15th, 1871		7,097 40	7,097 40
Jan. 3d, 1872		5,000 00	5,000 00
Jan. 29th, 1872	3,000 00	9,000 00	12,000 00
March 5th, 1872	2,400 00	7,200 00	9,600 00
April 6th, 1872	1,300 00	4,143 93	5,443 93
May 1st, 1872	1,200 00	3,818 57	5,018 57
June 5, 1872	1,500 00	4,507 92	6,007 92
July 5, 1872	2,100 00	3,092 20	5,192 20
Aug. 6th, 1872	2,200 00	3,116 12	5,316 12
Sept. 12th, 1872	400 00	594 00	994 00
Nov. 1st, 1872	400 00	656 00	1,056 00
Dec. 18th, 1872	400 00	580 00	980 00
March 18th, 1873	500 00	32 00	532 00
	$63,900 00	$119,672 60	$183,572 60
March 13th, 1873, paid James March, as agent			320 00

26 *Final Estimate.*

Martinsburg & Potomac R. R., James March, contractor.

Earth Excav., 53,921 c. yards, @ 30c	$16,176 30
Loose rock, 23,021 c. yards, @ 50c	11,510 50
Slate rock, 51,478 c. yards, @ 75c	38,608 50
Solid rock, 29,864 c. yards, @ $1.20	34,756 80
Burrow pits, 18,006 c. yards, @ 30c	5,401 80
Bridge mason, 6,165 perches, @ $7	43,155 00
Culvert, 54 perches, @ $7	378 00
Culv., dry, 1,788 perches, @ $3.50	6,258 00
Ballast, 12,648 perches, @ $1	12,648 00
	$168,892 90

		$162,892 90
Culv. and Co. road, Reynolds', Clapham's & Tooley's...		1,760 00
Cutting down banks at Reynolds', $14, and at Falling Waters, $10.50		24 50
		$170,677 40
Cattle stops and open culverts, built prior to Dec. 1, 1871, allowed by former, but condemned by present engineers, 291 pch., @ $3.50	$1,018 50	
Earth placed in bank station, 370–372, to make road in front abutment W. V., 3,672 yds., @ 30c	1,101 60	
Slate rock allowed by former eng. as ballast, but condemned by present, 4,571 pch., @ $1	4,571 00	
		6,691 10
Total am't		$177,368 50

The above is correct.

(Signed) T. ABELL HUNTER,
Asst. Eng. M. & P. R. R.

[Copy]

27 (*Additional bill of particulars filed by plaintiff, above referred to.*)

"Martinsburg & Potomac R. R. Co., to James March, Dr.

1871.		
March 1,	To damages for detention and suspension of work for ten days at Powell's Bend, by order of company's engineer, while considering a change of location, and for time of 20 men, @ $1.75 per day	$350 00
"	To detention and loss of service and feeding 8 horses for 10 days, @ $2.50 per day, occasioned by order of company's engineer while considering the change of location at Powell's Bend	200 00
		$550 00
1871.		
March 2,	To expenses for removing shanty, occasioned by change of location of original line on Dr. Rutherford's farm, 4 carpenters for 28 days, @ $2.25 per day	63 00

1871.		
March 2,	One laborer for 2¼ days, assisting carpenters, @ $1.50 per day.....	$3 37
"	One 4-horse team hauling lumber for 4 days, @ $8 per day.....	32 00
		$98 37
1871.		
July 3,	To removing old buildings at Reynolds', on line of railroad.....	50 00
1871.		
Aug. 4,	To bailing water at Emerson's slate cut, 54 men, @ $1.75 per day.....	94 50
1871.		
Sept. 5,	To 100 perches of cut stone that had been prepared for abutments over Tuscarora Creek on Y track, at Martinsburg.....	600 00
28		
1871.		
Sept. 6,	To bailing of water at Emerson's slate cut, 52 men, @ $1.75 per day.....	91 00
1871.		
Oct. 7,	To expenses incurred for rehandling and piling stone excavated from cut in Nadenboush's field that had been intended for embankment over Stewart's flat, between B. & Ohio R. R. and Tuscarora Creek, by order of company's engineers, in consequence of right of way not being procured, 4 men at 20 days each, @ $1.75 per day...	140 43
"	4 horses, 21 days each, @ $2.50.	210 00
		$350 43
1871.		
October 9,	To bailing water at Emerson's slate cut, 116 men, @ $1.75 per day.....	203 00
1871.		
Nov. 9,	Loss of time of 17 men for ten days, occasioned by suspension of work at Haut's Run bridge, owing to non-attendance of company's engineers, to wit:	
"	6 masons, @ $3 per day.....	$177 00
"	5 stone-cutters, @ $3.25 per day.....	162 50
"	6 laborers, @ $1.75 per day.....	105 00
"	5 horses, @ $2.50 per day.....	125 00
		$569 50

1871.		
Nov. 10,	Bailing water at Emerson's slate cut, 115 men, @ $1.75	$201 25
" 10½,	Bailing water at foundation of Bedington Bridge, 30 men, @ $1.75 per day	52 50
1871.		
Dec. 11,	To water bailing at Emerson's slate cut, 103½ men, @ $1.75 per day	181 12
1872.		
Jan'y 12,	To bailing water at Emerson's slate cut, 125, @ $1.75 per day	218 75
" 13,	To bailing water at Reynolds' cut, 18½ men, @ $1.75 per day	32 37
29		
1872.		
Feb'y 14,	To recutting and altering stone which had already been prepared for wing abutments at Falling Waters bridge, in consequence of change of masonry by order of Co. engineer:	
"	17 stone cutters 330 days, @ $3.25 per day	$1,072 50
"	One blacksmith, 18¾ days, @ $2.00 per day	37 50
"	2 laborers, 18 days each, @ $1.75 per day	63 00
"	1 tool boy, 18 days, @ $1.50 per day	27 00
		$1,200 00
1882.		
Feb'y 15,	Bailing water at slate cut at Emerson's, 155 men, @ $1.75 per day	271 25
1872.		
Feb'y 16,	To extra expense incurred in recutting stone that had already been prepared for wing abutments over Tuscarora creek on main line:	
"	To 295 stone cutters, @ $3.25 per day	$958 75
"	To one laborer, 21 days, @ $1.75 per day	36 75
"	One tool carrier, 21½ days, @ $1.50 per day	32 25
"	One blacksmith, 22 days, @ $2.00 " "	44 00
		$1,071 75

1872.
March 17, To extra expense incurred in recutting stone which had already been prepared for wing abutments over Tuscarora creek on main line, by [order] of Co. engineer:

102¾ stone cutters, @ $3.25 per day.....	$333 94
One laborer, 14¾ days, @ $1.75 per day.....	25 81
One tool boy, 15 days, @ $1.50 per day.....	22 50
One blacksmith, 23 days, @ $2.00 per day...	46 00
	$428 25

1872.
March 18, To bailing water at Emerson's slate cut, 132¾ men, @ $1.75 per day..... 232 31

30

1872.
April, Men and teams making approaches to bridge over railroad at Reynolds' or Clapham's, by order of Co. engineer:

98½ men, @ $1.75 per day.....	$172 37
" One foreman, 8 days, @ $2.50 per day..	20 00
" 64 horses, @ $2.50 per day.....	160 00
	$352 37

1872.
April, To extra expenses incurred by taking off and putting on ballast on railroad bed on Mayer's farm, in consequence of change of grade by order of company's engineer:

To 288¼ men, @ 1.75 per day..	$504 44
One foreman, 15 days, @ $2.25 per day.....	33 75
125 horses, @ $2.50 per day.....	312 50
	$850 69

1872.
April, To bailing water at Emerson's cut, 73¾ men, @ $1.75 per day..... $129 06

1872.
April, To extra expense incured in consequence of lowering and regrading road between Powel's Bend and Emerson's slate cut, including part of slate cut, by order of Co. engineer:

To 400 men, @ $1.75 per day.....	$700 00
To one foreman, 15 days, @ $2.50 per day...	37 50
100 horses, at $2.50 per day.....	250 00
To one tool boy, 11½ days, @ $1.00 per day..	11 50
	$999 50

1872.			
May,	To extra expenses incurred in consequence of lowering and regrading road bed between Powel's Bend and Emerson's slate cut, in-		
31	cluding part of slate cut, by order of company's engineer:		
	To 239 men, @ $1.75 per day		$418 25
	One foreman, 12 days, at $2.50 per day		30 00
	One water boy, 10½ days, @ $1.50 per day		15 75
	54 horses, at $2.50 per day		135 00
			$599 00
1872.			
May,	To extra expense incurred by lowering grades in bottom of rock cut and on embankment which had been already graded, at Clapham's cut, by order of Co. engineer:		
	64 men, at $1.75 per day		$112 00
	One foreman, @ $2.50, per day for 8 days		20 00
	27 1-5 horses, @ $2.50 per day		68 00
			$200 00
1872.			
June.	To loss of time of 81 men each for 12 days, and 41 horses for same time, occasioned by suspension of work at Powel's Bend pending change of grades through rock cut		$3,000 00
1872.			
July,	Cutting down ferry road at Falling Waters, by order of Co. engineer:		
	8 men, @ $1.75 per day		$14 00
"	4⅓ horses, @ $2.50 per day		10 50
			$24 50
1872.			
August.	To 9 cut stone for foundation of trestle at Reynolds' bridge		$40 00
	To 9 men, @ $1.75 per day		15 75
	To 12 horses at $2,00 each		24 00
32			
			$79 75
1872.			
Sept.,	Extra work done at Reynolds' bridge, trimming down side for trestle of bridge 16½		
	16½ men, @ $1.75 per day		$28 87
	Powder and fuse used at same place at same time		3 00
			$31 87

1873.			
January,	Expenses incurred owing to non-attendance of company's engineer at Powel's Bend:		
	25 men for one day, @ $1.75 per day.....	$43	75
	One foreman for one day, @ $2.50 per day...	2	50
	4 horses for one day, @ $2.50 per day.....	10	00
		$56	25
1873.			
February,	Expense incurred owing to non-attendance of company's engineers, at Powel's Bend:		
	To 25 men at 7 days each, @ $1.75 per day..	$306	25
	One foreman, 7 days, @ $2.50 per day.....	17	50
	23 horses, at $2.50 per day.....	57	50
		$381	25
1883.			
February,	Trimming cut and making fill in Powel's Bend after contract being finished, by order of company's engineer.....	321	75
	To timbers, plank, and lumber which were left on bridges for use of Co. between Powel's Bend and Falling Waters.....	200	00
	Paid Joseph Creswell for use of quarry and stone for building bridges and culverts on line of road.....	425	00
33	To Zern, for use of stone for bridges and culverts on line of railroad.....	$133	70
	To men employed by Co.'s engineer from March, 1871, to March, 1873:		
	Bayne, 108 men, @ $1.75 per day.....	$189	00
	Ward, 8 men, @ $1.75 per day.....	14	00
	Hunter, 22 men, @ $1.75 per day.....	38	50
		$241	50
	To 20 doz. tin tubes for Emerson's slate cut...	$96	00

And at another day to wit, at a term of said court held at the place aforesaid, on Friday, the 11th day of October, A. D. 1878, came the parties, by their attorneys, and the jury empanneled and sworn in this cause appeared in court, according to their adjournment on yesterday, and thereupon, for reasons appearing to the court, Isaac Snyder, one of the jurors aforesaid, is withdrawn, and the rest of the jury from rendering a verdict are discharged, and this cause is continued until the tenth day of the next term of this court, for a trial thereof to be had. And the defendant having excepted to the sufficiency of the bill of particulars filed by the plaintiff with his declarations in this

cause, on motion of the plaintiff leave is given him to file an amended bill or bills of particulars in this cause within sixty days from the rising of this court, and the defendant has leave to file off-sets within thirty days after the plaintiff shall have filed such amended bill of particulars, and the plaintiff shall, within fifteen days after the
34 filing of such off-sets by the defendant, file his counter off-sets.

And at another day, to wit, at a District Court of the United States for the District of West Virginia, continued and held at Clarksburg, on Tuesday, the 15th day of April, A. D. 1879, the defendant having excepted to an opinion of the court given upon the trial of this cause, tendered his bill of exceptions, which are in the words and figures following, to wit: "Be it remembered that upon the trial of this cause the defendant tendered to the court a special plea, marked (A. A.,) which was objected to by the counsel for the plaintiff, and the same was argued by counsel; whereupon it was considered by the court that the said plea be rejected. Thereupon the defendant tendered said plea, omitting from the same the words embraced in brackets on the last page of said plea, which was objected to by the counsel for the plaintiff, and the court rejected said plea in its amended form; whereupon the def't excepted, and prays that these, his exceptions, may be signed, sealed, and enrolled, which is accordingly so done. (Signed) J. J. Jackson. [SEAL.]"—which are here signed, sealed, and ordered to be made a part of the records of this cause.

(Plea marked (A. A.,) referred to in Bill of Exceptions.)

MARTINSBURG AND POTOMAC RAILROAD COMPANY
ads.
JAMES MARCH.

And for a further plea in this behalf, the said defendant
35 saith, that the plaintiff ought not to have or maintain his action aforesaid against the said defendant, because it saith that heretofore, to wit, on the 29th day of December, 1870, the said plaintiff entered into a contract in writing with the said defendant by which he agreed to furnish all the material and perform all the labor necessary to construct and finish in every respect, in the most substantial and workmanlike manner, the grading and masonry of the sections of a railroad between Powell's Bend and Martinsburg, the construction of said sections to include all its appurtenances, and to be in all respects according to the specifications and prices contained and agreed upon in said contract, which contract is the same in part set forth in the plaintiff's declarations, and upon which the present action is founded. And the defendant further saith, that amongst the provisions contained in said contract are the following, to wit:

"To prevent all disputes, it is hereby mutually agreed that the said engineer shall, in all cases, determine the amount or quantity of

the several kinds of work which are to be paid for under this contract, and the amount of compensation at the rates herein provided for, and also that the said engineers shall in all cases decide every question which can or may arise relative to the execution of this contract on the part of said contractor, and his estimate shall be
36 final and conclusive."

And it is further provided, "that whenever this contract shall be completely performed on the part of the said contractor, the said engineer shall certify the same in writing, under his hand, together with his estimate as aforesaid, and the said company shall within thirty days after the receipt of such certificate pay to the said contractor, in current notes, the sum which according to this contract shall be due, provided, however, and it is so distinctly understood and agreed, that the said Martinsburg and Potomac Railroad Company may pay to the said James March two-fifths, or forty per cent., of every estimate which it is required and called upon to pay, in bonds of the county of Berkley, to be taken and received by the said James March at their par value."

And the defendant further saith, that in pursuance of the duty devolved upon the defendant, it selected and appointed as the chief engineer of the Martinsburg and Potomac Railroad Company a certain James L. Randolph, an individual of acknowledged skill, ability, and reputation in his profession, and of undoubted integrity of character, and suitable in all respects for the position, who carefully and laboriously examined and measured all the material, labor, and work furnished and performed by the plaintiff in the construction of said railroad from Powell's Bend to Martinsburg, and who determined all questions arising under the execution of said contract, and
37 as the result of such examination and measurement, carefully, honestly, impartially, and to the best of his skill and judgment, done and performed by said chief engineer, with the aid, assistance, and concurrence of the assistant and resident engineer, ascertained and determined the amount or quantity of the several kinds of work, and the amount of compensation at the rate provided for by the contract, and the amount due the plaintiff in the execution of said contract, in words and figures following, to wit:

Earth excav.,	53,921 cubic yards	@	30 c.....	$16,176 30
Loose rocks,	23,021 " "		50	11,510 50
Slate rock,	51,478 " "		75	38,608 50
Solid rock,	28,964 " "	$1	20	34,756 80
Burrow pits,	180,06 " "		30	5,401 80
Bridge mason.,	6,165 perches	7	00	43,155 00
Culvert, "	54 "	7	00	378 00
Culv., dry,	1,788 "	3	50	6,258 00
Ballast,	12,648 "	1	00	12,648 00
				$168,892 90

Culv. & Co. road—Reynolds', Clapham's & Tooley's...		$1,760 00
Cutting down bank at Reynolds', $14.00, and at Falling Waters $10.50.....		24 50
		$170,677 40
Cattle stops and open culverts built prior to Dec. 1, 1871, allowed by former but condemned by present engineer, 291 pch., @ $3 50.....	$1,018 50	
Earth placed in bank station 370–372, to make road in front abutment, W. Va., 3,672 yards, @ 30 c.....	1,101 60	
Slate rock allowed by former engineer as ballast, but condemned by present, 4,571 per 100.....	4,571 00	
		6,691 10
Total am't.....		$177,368 50

38 And the defendant further saith that afterwards, to wit, on the — day of ——, 1872, the Cumberland Valley or Franklin Railroad Company having decided to make its abutment on the south bank of the Potomac five feet lower than was up to that time contemplated, it thus became necessary for the defendant to lower the excavation in the rock cut adjacent to said abutment a like number of feet, when the plaintiff, as contractor, was required by the engineer to proceed with said rock excavation; but he declined to do so unless the said engineer would agree to allow him $2.00 a cubic yard instead of the $1.20 provided for in the contract set forth in the declaration; whereupon the said engineer, with the consent of the defendant, agreed to allow the compensation of $2.00 per cubic yard for the additional excavation in said cut. And when the said additional work was thus completed, embracing 2,161 cubic yards, at the price of $4,322.00, the same was estimated by the engineer and paid by this defendant in full to the plaintiff, the said plaintiff expressing himself fully satisfied with the estimate certified by the said engineer and with the payments made in full to him for the same by this defendant.

And the defendant further saith, that in accordance with the above examination and measurements, that said chief engineer certified his said final estimates to the president of said defendant company, in writing and under his hand, from which final estimates it ap-
39 pears that there was due to the plaintiff for material, work, and labor done and performed in the construction of said roads, exclusive of the condemned work, the sum of $174,999.40, and including the said condemned work, the sum of $181,690.50; and the defendant avers that in accordance with the judgment, final estimates, and decision of said engineer, which is alike final and con-

clusive upon this defendant as upon the plaintiff, the said defendant did, within thirty days from the receipt of said certificates, deliver to the plaintiff good and lawful bonds of the county of Berkley, to the amount of $63,900.00, which were accepted and received by the plaintiff at par value, as cash, and did also deliver to the said plaintiff checks upon the National Bank of Martinsburg amounting to the sum of $119,672.60, which were in like manner accepted and received by the said plaintiff as cash in payment of said contracts, making together an aggregate payment of $183,572.60 received as payments upon said contracts. And so the defendant saith, that the final estimate of the said engineer, made as aforesaid, was a final and conclusive settlement of all that was due the plaintiff under said contracts, and is a bar to any further inquiry into the execution of said contracts; and the payments made by this defendant in pursuance of said final estimates as aforesaid are a full payment and discharge of all that is due to the plaintiff under said contracts;

40 [and it appearing from the final estimates and the payments made on account of said contracts that this defendant has overpaid to the plaintiff the sum of $8,573.20 if the condemned work is excluded from the calculations, and has overpaid to the plaintiff $1,882.10 if the condemned work is allowed him, the defendant pleads these overpayments, or payments in excess of the final estimate, in the nature of set-offs, as so much due by the plaintiff to the said defendant, and asks that judgment may be entered against the plaintiff for the same.] And so the defendant saith that he has fully performed all the promises contained in said contract to be performed by him, and this he is ready to verify; wherefore he prays judgment, &c.

(Signed,) FAULKNER,
For Defendant.

And at another day, to wit, at a term of said court held at the place aforesaid, on Tuesday, the 15th day of April, A. D. 1879, came the parties, by their attorneys, and thereupon came a jury, to wit: George E. Sampson, Isaac B. Kelly, Harden Kuhn, John R. Davenport, Ebenezer F. Moore, Daniel W. Rector, John S. Carlile, Samuel R. Harrison, Samuel M. Bell, Wilbur F. Richards, Benjamin W. Jackson, and Elisha L. Snodgrass, all good and lawful men of this judicial district, who, being duly sworn to well and truly try the issue in this cause, and having partly heard the evidence, and the same not being concluded, and it being too late to finish the trial of

41 this cause on this day, the jury are adjourned over until tomorrow morning at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Wednesday, the 16th day of April, 1879, came again the parties, by their attorneys, and the jury impanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this

cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Thursday, the 17th day of April, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Friday, the 18th day of April, 1879, came the parties, by their attorneys, and the jury impanneled and sworn
42 in this cause again appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Saturday, the 19th day of April, 1879, came again the parties, by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until Monday morning next, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Monday, the 21st day of April, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause appeared in court according to their adjournment on Saturday last, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held
43 at the place aforesaid, on Tuesday, the 22d day of April, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Wednesday, the 23d day of April, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Thursday, the 24th day of April, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

44 And at another day, to wit, at a term of said court held at the place aforesaid, on Friday, the 25th day of April, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause appeared in court pursuant to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Saturday, the 26th day of April, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until Monday morning next, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Monday, the 28th day of April, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause appeared in court according to their adjournment on Saturday last, and having further heard the evidence, and the same not

45 being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Tuesday, the 29th day of April, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Wednesday, the 30th day of April, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the

place aforesaid, on Thursday, the 1st day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn
46 in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Friday, the 2d day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Saturday, the 3d day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until Monday morning next, at 9 o'clock.

And at another day, to wit, at a term of said court held at
47 the place aforesaid, on Monday, the 5th day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on Saturday last, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Tuesday, the 6th day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Wednesday, the 7th day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow
48 morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Thursday, the 8th day of May, 1879, came

the parties, by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Friday, the 9th day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Saturday, the 10th day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having further heard the evidence, and
49 the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until Monday morning next, at 9 o'clock.

And at another day, to wit, at a term of said court, held at the place aforesaid, on Monday, the 12th day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on Saturday last, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Tuesday, the 13th day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Wednesday, the 14th day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn
50 in this cause again appeared in court according to their adjournment on yesterday, and having further heard the evidence, and the same not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 9 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Thursday, the 15th day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in

this cause appeared in court according to their adjournment on yesterday, and having fully heard the evidence, and the arguments of counsel not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 8 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Friday, the 16th day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in this cause again appeared in court according to their adjournment on yesterday, and having fully heard the evidence, and the arguments of counsel not being concluded, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until to-morrow morning, at 8 o'clock.

51 And at another day, to wit, at a term of said court held at the place aforesaid, on Saturday, the 17th day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn in the cause again appeared in court according to their adjournment on yesterday, and having fully heard the evidence and arguments of counsels, retired to their chamber to consider of their verdict, and after some time returned into court, and not having agreed upon a verdict, and it being too late to finish the trial of this cause on this day, the jury are adjourned over until Monday morning next, at 7 o'clock.

And at another day, to wit, at a term of said court held at the place aforesaid, on Monday, the 19th day of May, 1879, it is hereby ordered that the witnesses who attended this court at the spring and fall terms, 1878, for both plaintiff and defendant, may be authorized to prove their attendance as such before the clerk of this court, and receive their certificates for the same in cases where the same has not heretofore been done.

And on the same day, to wit, at a term of said court held at the place aforesaid, on Monday, the 19th day of May, 1879, came the parties, by their attorneys, and the jury impanneled and sworn

52 in this cause again appeared in court, according to their adjournment on Saturday last, and having fully heard the evidence and arguments of counsel, retired to their chamber to consider of their verdict, and after some time returned into court, and upon their oaths do say: "We, the jury, find for the plaintiff, and assess his damages at forty-one thousand four hundred and seventy-five dollars and ninety-seven cents, with interest thereon from the 1st day of March, 1873, which interest we find to be fourteen thousand nine hundred and thirty-one dollars and thirty-four cents, which, being added to said principal sum, makes the aggregate sum of fifty-six thousand four hundred and seven dollars and thirty-one cents, which amount we find for the plaintiff."

And thereupon the defendants, by their attorneys, moved the court to set aside the verdict of the jury in this cause, and grant them a new trial herein, of which motion the court takes time to consider.

And at another day, to wit, at a district court of the United States for the District of West Virginia, continued and held at Clarksburg, on Wednesday, the 8th day of December, 1880, came the defendants, by their attorney, and here filed the reasons assigned by them why the court should set aside the verdict of the jury heretofore rendered in this cause, and grant them a new trial herein, which are
53 in the words and figures following, to wit:

"After the rendition of the verdict in this cause, the defendant moved to the court to set aside the verdict of the jury in this case, and to grant a new trial on the following grounds:

1st. That the verdict is against the evidence given in the cause.

2d. That it is against the law applicable to the case.

3d. Because of misdirection and error of the court in refusing the instructions asked of the court to the jury, of which special reference is made to the 10th and 18th instructions.

4th. Because the jury disregarded certain instructions of the court."

And at another day, to wit, at a term of said court held at the place aforesaid on Friday, December the 10th, 1880, it is ordered by the court that unless the said plaintiff, James March, shall within thirty days pay to Henry Bryan, stenographer, for services in taking down the testimony in this cause, that the registry of this court do pay to the said Bryan out of the funds deposited as security for costs in this cause the sum of $70.

And now at this day, to wit, at a district court of the United States for the District of West Virginia, continued and held at Clarksburg, on Thursday, the 22d day of December, 1881, came the parties, by their attorneys, and the court having fully heard the arguments of counsel upon the motion to set aside the verdict of jury in this cause and grant them a new trial therein, it is con-
54 sidered by the court that said motion be overruled upon all the grounds assigned by the defendants and heretofore entered in the records in this cause. But the court being of opinion that the amount ascertained and assessed by the jury for the plaintiff as damages is excessive, and that an abatement should be made to the extent of $13,475.97 of the principal assessed by the jury in their verdict aforesaid, requires the plaintiff to release the said sum so ascertained by the court to be excessive, and directs that unless such abatement be made by the said plaintiff a new trial be awarded. And the plaintiff's attorneys, Messrs. Davies and Goff, here, in open court, assenting to said abatement, it is therefore considered by the court that the plaintiff recover against the said defendants the sum of twenty-eight thousand dollars damages, with interest thereon from the first day of March, 1873, until paid, and his costs by him about his suit in this behalf expended.

And on the same day, to wit, at a term of said court held at the place aforesaid, on Thursday, the 22d day of December, 1881, the defendant having excepted to certain opinions of the court given upon the trial of this cause, tendered their several bills of exceptions,

marked, respectively, Nos. "1," "2," "3," "4," "5," "6," "7," "8," "9," "10," "11," and "12," which are here signed, sealed, and ordered to be made a part of the record in this cause.

(*Bill of Exception "No. 1," above referred to.*)

55 "Be it remembered that upon the trial of this cause, the plaintiff having introduced in evidence the contract between plaintiff and defendant of the 29th of December, 1870, and also the final estimate of the chief engineer of the Martinsburg & Potomac R. R. Co., in the words and figures following, to wit:—

"*Final Estimate.*

Martinsburg & Potomac R. R.; James March, Contractor.

Earth Excav., 53,921 c. yards, @ 30c		$16,176 30
Loose rock, 23,021 c. yards, @ 50c		11,510 50
Slate rock, 51,478 c. yards, @ 75c		38,608 50
Solid rock, 28,964 c. yards, @ $1.20		34,756 80
Burrow pits, 18,006 c. yards, @ 30c		5,401 80
Bridge mason., 6,165 perches, @ $7		43,155 00
Culvert, 54 perches, @ $7		378 00
Culv., dry, 1,788 perches, @ $3.50		6,258 00
Ballast, 12,648 perches, @ $1		12,648 00
		$168,892 90
Culv. and Co. road, Reynolds', Chapham's & Tooley's		1,760 00
Cutting down banks at Reynolds', $14, and at Falling Waters, $10.50		24 50
		$170,677 40
Cattle stops and open culverts built prior to Dec. 1st, 1871, allowed by former but condemned by present engineer, 291 pch., @ $3.50	$1,018 50	
Earth placed in bank station 370–372, to make road in front abutment W. V., 3,672 yds., @ 30c	1,101 60	
Slate rock allowed by former engineer as ballast, but condemned by present, 4,571 pch., @ $1	4,571 00	
		6,691 10
Total amt		$177,368 50

The above is correct.

[Copy] J. ABELL HUNTER,
Asst. Eng. M. & P. R. R."

56 —the defendant moved the court to give the four following instructions, marked, respectively, numbers 1, 2, 4, and 17.

(*Instruction Number* "1.")

"The court instructs the jury that if from the evidence before them they believe that the materials furnished and work done by the plaintiff, as set forth in his bill of particulars, were so furnished and done under the contract of the 29th of December, 1870, and that in accordance with said contract a final estimate of said work and materials was made by the chief engineer therein designated to perform that duty, then the plaintiff cannot recover beyond the amount of material and labor so estimated by said engineer, unless they believe from the testimony that there was fraud or intentional misconduct or gross mistake on the part of said engineer in making said estimates."

(*Instruction No.* "2.")

"The court instructs the jury that if from the evidence before them they find that the materials furnished and work done by the plaintiff was so performed and furnished under the contract set forth in the first count in the declaration; that the plaintiff had submitted himself to James L. Randolph, chief engineer, as the person designated in said contract, from the 6th of December, 1871; recognized his authority as such, and accepting monthly estimates from
57 him until the close of the work; that a final estimate of said work and material was made out by said chief engineer in accordance with the requirements of said contract,—then, in the absence of fraud or any intentional misconduct or gross mistake on the part of said engineer in making said final estimates, the jury must regard said estimate as conclusive between the parties; and if it appears from the evidence that the defendant has paid to the plaintiff all that said final estimate awards to him, they must find a verdict for the defendant on so much of the bill of particulars filed in this cause as is embraced in the paper annexed to the declaration, and described as A."

(*Instruction No.* "4.")

"The court instructs the jury that under the contract in this case, the person duly appointed and holding the position as chief engineer at the close of the work, and at the time when it was proper that a final estimate should be made, is the person designated in said contract to make the final estimate of the materials furnished and labor performed by the contractor; and the fact that he was not the engineer from the commencement of the works, and did not supervise a considerable portion of the work during its construction, does not detract from his official authority to make a final and conclusive estimate of the entire work; and if from the evidence they find
58 that said final estimate was made by him in good faith, free from all fraud and intentional misconduct or gross mistakes,

they must regard said estimate as conclusive between the plaintiff and defendant in this action, and find accordingly."

(*Instruction No.* "17.")

"The court instructs the jury that the approximate estimates made under the contract sued on in this case afford no certain and reliable basis upon which to found their verdict, as they were made to enable the plaintiff to prosecute his work advantageously, and are subject to revision and correction in the final estimate of the chief engineer. If, therefore, they find that the chief engineer of the defendant has made an honest final estimate of the entire work on the road, free from fraud and intentional misconduct or gross mistake, and that the defendant has paid to the plaintiff the full amount of the final estimate so made, then the defendant is in no respect liable for the $16,664, the twenty per cent. reserved on said monthly estimates, but the same is to be regarded as satisfied in the payments made on such final estimate," which the court refused to give, except by inserting after the words "fraud and intentional misconduct" in said instructions the words "or gross mistakes;" and proceeding
59 to add said last-mentioned words, the said instructions were given by the court to the jury; to which decision of the court adding the words "or gross mistake," the defendant excepts, and prays that these his exceptions may be signed, sealed, and enrolled, which is accordingly so done.

(Signed) J. J. JACKSON. [SEAL.]

(*Bill of Exceptions No.* "2.")

Be it remembered, that upon the trial of this cause, the plaintiff having introduced in evidence the contract of the 29th of December, 1870, between the plaintiff and defendant, and also evidence tending to show that he had purchased stone beyond the limits of the road for the purposes of masonry on said road, by direction of the company's assistant engineer, Boyne, the defendant asked the court to give the following instruction, marked No. 5:

(*Instruction, marked No.* 5.)

"The court instructs the jury that, as by the contract between plaintiff and defendant the plaintiff has covenanted and agreed to furnish all the material required for the grading and masonry of the road, the jury must exclude from their consideration all evidence touching the item of stone purchased from Creswell and Zoon and used in the masonry of said road, although they should find from the evidence that such stone were obtained beyond the limits of the road, unless the jury find that the contractor purchased the rock under and by direction of the company's engineer, of which they had
60 no other notice, and that the company at the time acquiesced in and did not repudiate the action of their engineer or the

purchase of the stone," which the court refused to give, except by adding the following words, "unless the jury find that the contractor purchased the rock under and by the direction of the company's engineer, of which they had no other notice, and that the company at the time acquiesced in and did not repudiate the action of their engineer or the purchase of the stone,"—which instruction, with said addition, the court gave, to which refusal of the court to give the said instruction as prayed for by the defendant, and to the giving of the same with the additions made thereto by the court, the defendant excepts; and the defendant then asked the court to add the following to said amended instructions: "but if the jury find that the defendant had no notice from the assistant engineer or other person that the stone so purchased was to be charged to the company, and that the company never gave its assent to any such purchase, then the act of said engineer in authorizing the purchase of said stone on the credit of the company was without authority, and no recovery can be had against the defendant for the same;"—which the court refused to do; whereupon the defendant excepts to the decision of the court for refusing to add the last-mentioned paragraph, and
61 prays that this his exception may be signed, sealed, and enrolled, which is accordingly so done.

(Signed) J. J. JACKSON. [SEAL.]

(*Bill of Exceptions No. 3.*)

"Be it remembered that upon the trial of this cause, the plaintiff having introduced in evidence the contract between the plaintiff and defendant of the 29th of December, 1870, and also the final estimate of chief engineer Randolph, and also evidence tending to impeach said final estimate as fraudulent, the defendant moved the court to give to the jury the following instruction, marked number 20:

(*Instruction "No. 20."*)

"The court instructs the jury that the fraud, or intentional misconduct on the part of the defendant's engineer, which shall vitiate the estimate made by them, must be made out to the satisfaction of the jury by evidence clearly irreconcilable with *bona fides* and an honest purpose on the part of said engineer, and which the jury must find from the evidence such fraud or misconduct on the part of said engineer, before they will be justified in disregarding the final estimates made by him of the value of the work under the contract sued on, unless the jury further find that the engineer committed gross mistakes in making said final estimate, in which event they will be authorized and justified in presuming fraud
62 and disregarding the final estimate,"—which the court refused to give, except by adding thereto the following words: "Unless the jury further find that the engineer committed gross mistakes in making said final estimate, in which event they will be

authorized and justified in presuming fraud and disregarding the final estimate." To which opinion, in the refusal of the court to give instruction as prayed for by the defendant, and to the giving of the same with the addition made thereto by the court, the defendant excepts, and prays that this his exception may be signed, sealed, and enrolled, which is accordingly done.

(Signed) J. J. JACKSON. [SEAL.]

(*Bill of Exceptions* "*No.* 4.")

Be it remembered that upon the trial of this cause, the plaintiff having introduced in evidence the contract of the 29th of December, 1870, and also the final estimate of chief engineer Randolph, and also evidence tending to impeach said final estimate as fraudulent, the defendant move the court to give to the jury the following instruction, marked No. 16:

(*Instruction No.* 16.)

"The court instructs the jury that to sustain the allegation of the plaintiff that the final estimate of chief engineer Randolph is fraudulent, it is not sufficient merely to show that work was neglected or condemned which in the opinion of others should not have been rejected or condemned; that he refused, under his construction
63 of the contract, to allow for work which in the opinion of others ought to have been allowed, or that he classified the material removed differently from what in the opinion of others it should have been classified; but to sustain such allegation they must be satisfied from the evidence that the engineer *knowingly and willfully* disregarded his duty, and rejected and disallowed work which he knew, or should have known, conformed in all respects to the terms of the contract, and there was a willful purpose upon his part to do wrong and to injure the contractor, by depriving him of some right,"—which the court refused to give. To which decision of the court refusing to give said instruction the defendant excepts, and prays that this his exception may be signed, sealed, and enrolled, which is accordingly done.

(Signed) J. J. JACKSON, [SEAL.]

(*Bill of Exceptions No.* 5.)

"Be it remembered that upon the trial of this cause, the plaintiff having introduced the contract between the parties in evidence, and also the testimony of witnesses tending to prove that the pier masonry for bridges claimed in the bill of particulars was different from and more expensive than the bridge masonry described in the contract, the defendant moved the court to give the following instruction, marked No. 8:

64 (*Instruction No.* 8.)

"The court instructs the jury that as the contract between plaintiff and defendant fixes the price of bridge masonry at seven dollars per perch of twenty-five cubic feet, they should exclude from their consideration all evidence claiming for what is charged as pier masonry of the bridge a price beyond that fixed by the contract for bridge masonry,"—to the jury, which the court refused to do, but in lieu thereof gave the following instruction, also marked No. 8½:

(*Instruction No.* 8½.)

"The court instructs the jury that bridge masonry, as described and set out in the contract, consists of stones which shall be well hammer-dressed on their face, in their beds and in their joints, so as to be as complete as the beds, joints, and face of cut stone in every respect would be, except the faces are hammered instead of cut, for which kind of masonry the contractor is entitled under the contract to seven dollars per perch. But if the jury further find from the evidence that the contractor, by direction of the company's engineer, built and constructed masonry on the line of this road known and designated as pier masonry, and that such masonry was different from the masonry described as bridge masonry in the contract, and as de-
65 scribed in the former part of this instruction, then the company, having acquiesced in the construction of such masonry, the contractor will be entitled to recover a fair value for such work, and will not be restricted to the price of seven dollars per perch for the same." To which decision of the court refusing to give the instruction asked for, and substituting in lieu thereof the instruction marked 8½, the defendant excepts; and prays that these, his exceptions, may be signed, sealed, and enrolled, which is accordingly done.

(Signed) J. J. JACKSON. [SEAL.]

(*Bill of Exceptions No.* 6.)

"Be it remembered that upon the trial of this cause, the plaintiff having introduced evidence tending to show temporary delays in the progress of the work after its commencement, whereby he sustained damage and loss of the time of hands and horses, the defendant moved the court to give the following instruction, marked No. 11:

(*Instruction No.* 11.)

"The court instructs the jury that to authorize the plaintiff to recover damages for the temporary delays complained of in the construction of the road, he must show that he was himself without default in the matter of such delays; that he gave prompt notice to the defendant of his inability to proceed with the work at the particular

points complained of and the causes thereof; and that there was no other unfinished station of the road to which his men
66 and horses could have been conveniently and beneficially transferred,"—to the jury, which the court refused to give, but in lieu thereof gave the following instruction, marked No. 11½.

(*Instruction No.* 11½.)

"The court instructs the jury that if they find from the evidence that the plaintiff was hindered and obstructed in the construction of the works by the company, or any of its agents or officers, whereby a temporary delay was occasioned by such obstruction or hindrance, that then the plaintiff is entitled to recover in this action such amount as will cover and compensate him for the amount paid for labor and such necessary expenses as were incurred by him by reason of such delay, unless he could conveniently and with no particular damage to himself transfer his men and horses to another portion of his work on said road, in which event it was his duty to do so, and he should not recover for such delay."

Whereupon the defendant excepted to the decision of the court refusing to give the instructions asked for, and also in giving the instruction substituted therefor, and the defendant prays that this his bill of exceptions may be signed, sealed, and enrolled, which is accordingly done.

(Signed) J. J. JACKSON. [SEAL.]

67 (*Bill of Exceptions No.* 7.)

"The court instructs the jury that under the plea of the act of limitation filed in this case, the following items, dated and proved more than five years before the institution of this suit, must be excluded from their consideration in the bill of particulars:

1871,	March.	Delays and detention of men and horses....	$550 00
"	"	Removing shanty at Rutherford's farm	98 37
		On margin: [Good as to this item and bad as to all others.]	
"	July.	Removing building at Reynolds'.....	50 00
"	August.	Bailing water at Emerson's.....	94 50
"	September.	100 perches of stone.....	600 00
"	"	Bailing water at Emerson's.....	91 00
"	October.	Expenses in rehandling stone.....	350 43
"	"	Bailing water at Emerson's cut.....	203 00
"	November.	Delay at Houte's Run bridge.....	569 50
"	"	Bailing water at Emerson's cut.....	201 25
"	"	Baling water at Beddington bridge.....	52 50
"	December.	Bailing water at Emerson's cut.....	181 12
1872,	January.	Bailing water at Emerson's cut.....	218 75
"	"	Same at Reynolds' cut.....	32 37

1872	February.	Recutting stone at Falling Waters.....	$1,200 00
"	"	Bailing water at Emerson's.....	271 25
"	"	Recutting stone.....	1,071 75
"	March.	Recutting stone.....	428 25
"	"	Bailing water at Emerson's.....	232 31
"	April.	Approaches to Reynolds' bridge.....	352 37
"	"	Taking off and putting on ballast.....	850 69
"	"	Bailing water at Emerson's cut.....	129 06
"	"	Extra expense, lowering and regrading road.....	999 00
"	May.	Same charge extended.....	599 00
"	"	Extra expense, lowering grade in Rock cut.....	200 00
	1872, June.	Loss of time and delays.....	3,000 00
68	March, 1871, Dec., 1871.	Men employed for Bayne, 108 men.....	189 00
March, 1871.		Detention for — men and — horses, for two months, on account of change of line from Myer's farm to Martinsburg.....	5,000 00"

Which the court refused to do, except as to the item $98.37, "removing shanty at Rutherford's farm, March, 1871," to which opinion of the court in refusing to give the instruction as prayed for, the defendant excepts and prays that his exception may be signed, sealed, and enrolled, which is accordingly done.

(Signed) J. J. JACKSON. [SEAL.]

(*Bill of Exceptions No. 8.*)

"Be it remembered, upon the trial of this cause, the defendant having introduced evidence tending to prove the facts set forth in the following instructions, asked the court to give the same:

(*Instruction No. 3.*)

"The court instructs the jury that if from the evidence before them they find that Edward Watts, as chief engineer, and Wm. M. Bayne, as his assistant engineer, were dismissed from the service of the defendant on the 2d of December, 1871, when the road was but partially constructed; that the said Bayne carried off with him the field notes and cross-sections which had been made by him whilst in the pay and service of the defendant; that he refused, upon the application of the succeeding engineer, to deliver up said field notes and cross-sections or copies thereof, but denied that he had any such books
69 and papers; that shortly after his dismission from the service of the defendant he was employed by the plaintiff as his private agent and engineer to attend to his interest in connection with said road, and continued in that service until April 1st, 1873; that said field-notes and cross-sections were withheld from the succeeding engineer, with the full knowledge of the plaintiff, by his private engi-

neer and agent; that the plaintiff, although aware that a remeasurement of the entire road was being made by the succeeding engineers, did not require his agent and private engineer, Bayne, to produce the cross-sections and field-notes then in his possession, and made no effort to have them placed in the possession of the engineers who were then in charge of the work; that the plaintiff, after notice of the final estimate made by James L. Randolph, chief engineer, in October, 1872, asked no remeasurement or revisal of said estimate,—then, even if the jury shall be of opinion that there are errors and imperfections in the classification of the work as embraced in said final estimate, resulting from a want of access to the cross-sections and field-notes in the possession of the plaintiff's agent, such errors and imperfect classification do not detract from the final, conclusive, and authoritative character of said final estimate, as between the plaintiff and defendant, provided the jury shall further believe
70 that said final estimate was made by an engineer in all respects competent for the performance of the duty devolved upon him; that he made said estimate in good faith, and in the conscientious discharge of his duty; and that he was guided in his results by a careful and diligent resort to all proper means and sources of information accessible to him under the then circumstances and conditions of the road."

But the court refused to give said instruction, to which decision of the court the defendant excepts, and prays that these, his exceptions, may be signed, sealed, and enrolled, which is accordingly so done.

(Signed) J. J. JACKSON. [SEAL.]

(*Bill of Exceptions No.* "9.")

"Be it remembered that upon the trial of this cause, the plaintiff having introduced in evidence the contract between plaintiff and defendant of the 29th of Dec., 1870, and also evidence tending to show that pier masonry was of a different character and much more expensive than the bridge masonry contemplated by the contract, and could not, as ordered by the engineers, be put up at $7 per cubic perch, the price to be paid for the bridge masonry described in said contract, the defendant moved the court to give the following instruction, marked No. 21:—

(*Instruction No.* 21.)

"The jury are instructed that in respect to the item of pier masonry, and the charge of $14 per perch therefor by the
71 plaintiff, as shown in his estimate or bill of particulars, that if they find that the defendant's chief engineer ordered such masonry to be made, and saw and inspected or examined the same after its completion, and considered the same in his final estimate, and therein treated the said pier masonry as bridge masonry, to be paid for by the defendant at the price of $7.00 per perch, under the

terms of the contract, then such determination and judgment of the engineer is final and binding on the plaintiff, (unless the jury find the said final estimate to be fraudulent,)"—to the jury, which instruction the court refused to give, but in lieu thereof gave the following, which is marked No. 21½—

(*Instruction No.* 21½.)

"The jury are instructed that in respect to the item of 'pier masonry,' and the charge of $14 per perch therefor by the plaintiff, as shown in his estimate or bill of particulars, that if they find that the defendant's chief engineer ordered such masonry to be made, and saw and inspected or examined the same after its completion, and considered the same in his final estimate, and therein treated the said 'pier masonry' as 'bridge masonry,' to be paid for by the defendant at the price of $7.00 per perch, under the terms of the contract, then such determination and judgment of the engineer is
72 final and binding on the plaintiff, unless the jury find that the price and value of the masonry fixed and returned by the engineer was inadequate and unjust to the contractor, in which event the jury may presume fraud, and disregard the price fixed by the engineer in his final estimate."

To which decision of the court, refusing to give the instruction asked for, and giving the instruction substituted in lieu thereof, the defendant excepts, and prays this his exception may be signed, sealed, and enrolled, which is accordingly done.

(Signed) J. J. JACKSON. [SEAL.]

(*Bill of Exceptions No.* "10.")

"Be it remembered that upon the trial of this case, the plaintiff having introduced evidence tending to show a delay in the construction of the work in the rock cut at Powell's Bend, near the Potomac River, in June, 1872, and the defendant having introduced evidence tending to show that said delay was caused by the action of the Cumberland Valley Railroad Company to lower the grade of its bridge six feet on the West Virginia side of the river, the defendant moved the court to give the following instruction to the jury, marked No. 6:—

(*Instruction No.* 6.)

"The court instructs the jury that if, from the evidence before them, they find that there was any delay in the prosecution of the
73 work in the rock cut at Powell's Bend, near the Potomac River, in June, 1872; that such delay was caused by the unexpected determination of the Cumberland Valley Railroad Company to lower the grade of its bridge on the West Virginia side of the river six feet; that the defendant had no authority or control over the

And further, that no demand has ever been made, or notice given to the chief engineer or to the company of any such claims and demands, prior to the institution of this suit,—then the plaintiff has failed to lay the only foundation upon which an action can be maintained against the defendant for said claims, and the jury must find for the defendant upon all the items above set forth, unless they shall be of opinion that the final estimate made by the chief engineer is fraudulent, in which event the action may be brought for each item without any estimate or certificate of the engineer." Which instruction the court refused to give; to which decision of the court refusing said instruction the def't excepts, and prays that these his exceptions may be signed, sealed, and enrolled; which is accordingly done.

(Signed) J. J. JACKSON. [SEAL.]

Instructions.

"The court instructs the jury that if from the evidence before them they find that the delays complained of at the rock cut at Powell's Bend, in June, 1872, occurred after the defendant had substantially completed all the work contemplated to be done by him under the contract of the 29th of December, 1870, at that point, and before the new contract at an increased price was entered into with him to deepen the rock cut at that point, the plaintiff cannot recover of the defendant damages for such delay, unless the jury find that the force there kept idle and unemployed were so retained at instance and request of the defendant.

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"The court instructs the jury that the final estimate of the chief engineer is conclusive between the parties, unless it is impeached for being unfair and fraudulent; and for this purpose the evidence of Wm. H. Bayne, (at one time an engineer of this company,) together with a paper certified by him, which he calls 'his final estimate,' may be considered by the jury, to show that the final estimate of the chief engineer, Mr. Randolph, was based upon gross mistakes, which are unfair and unjust to the contractor, from which they would be authorized and justified in presuming fraud in the final estimate of said chief engineer.

"The contract between plaintiff and defendant having in express terms required the plaintiff to furnish all the material, and to perform all the work necessary to the grading and masonry of the road, and the blasting of rock where necessary to remove them from the bed of the road, being one of the duties devolved upon the plaintiff by the contract, the court instructs the jury that they must exclude from their consideration the evidence touching the 20 dozen tin tubes purchased by the plaintiff for the purpose of being used in blasting the slate rock, said tubes being one of the modes or instruments adopted by the plaintiff for the more convenient performance of a duty imposed upon him by the contract."

79

"The court instructs the jury that all the items embraced in the

plaintiff's bill of particulars fall within the provision of the contract, which provides 'that the engineer shall in all cases decide every question which shall arise relative to the execution of the work on the part of the contractor, and that his estimate shall be final and conclusive;' if, therefore, the jury find from the evidence that the chief engineer made a final estimate of the material furnished and work performed by the contractor, including the items mentioned in the bill of particulars, in the execution of the work, and of the indebtedness of the defendant to the contractor under the contract, including the items mentioned in the bill of particulars, that then the jury must find said final estimate conclusive between the parties upon all the matters of indebtedness embraced in said bill of particulars passed upon; and if they find the defendant has paid to the plaintiff the full amount so ascertained to be due by the
80 defendant to the plaintiff, they should find a verdict for the defendant, unless they further find that the final estimate was based upon gross mistakes, which are unfair and unjust to the contractor, from which they would be authorized and justified in presuming fraud in said final estimate; in which event said final estimate will not be conclusive between the parties."

UNITED STATES OF AMERICA, }
District of West Virginia, } *ss:*

I, Jasper Y. Moore, clerk of the District Court of the United States for the District of West Virginia, do certify that the foregoing is a true transcript of the records and proceedings now on file in my office in said cause of James March against The Martinsburg and Potomac Railroad Company, in assumpsit, lately depending in said district court of the United States for the District of West Virginia, at Clarksburg.

In testimony whereof, I hereto set my hand and the seal of said district court, at Clarksburg, this 9th day of February, A. D. 1882, and in the 106th year of the Independence of the United States of America.

[SEAL.] JASPER Y. MOORE, *Clerk*,
D. C. U. S., D. W. Va.

Clerk's fees for record, $33.40.

81 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the District of West Virginia, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between James March, plaintiff, and the Martinsburg and Potomac Railroad Company, defendant, a manifest error hath happened to the great damage to the defendant, as by its complaint appears, we being willing that if error, if any hath been, should be duly cor-

rected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of
82 October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 28th day of April, in the year of our Lord one thousand eight hundred and eighty-two.

(Signed) JAMES H. McKENNEY, [SEAL.]
Clerk of the Supreme Court of the United States.

Allowed by—

(Signed) M. R. WAITE,
Chief Justice U. S.

April 28, 1882.

This writ of error was produced by the Martinsburg and Potomac Railroad Company named therein, and deposited in the district court therein mentioned, on the 23d day of May, in the year of our Lord 1882; and the said writ was served by a copy thereof being
83 lodged for James March, the adverse party, in the clerk's office of the said court, where the records of the case therein mentioned remains.

(Signed) JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

United States of America, to James March, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of West Virginia, wherein the Martinsburg and Potomac Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice
84 of the Supreme Court of the United States, this twenty-eighth day of April, in the year of our Lord one thousand eight hundred and eighty-two.

(Signed) M. R. WAITE,
Chief Justice, U. S.

On this 31st day of August, in the year of our Lord one thousand eight hundred and eighty-two, personally appeared Jasper Y. Moore, before me, the subscriber, Thomas S. Spates, a commissioner of the District Court of the United States for the District of West Virginia, and makes oath that he delivered a true copy of the within citation to John J. Davis, one of the counsel of record for James March, plaintiff.

(Signed) JASPER Y. MOORE.

Sworn to and subscribed the 31st day of August, A. D. 1882.

(Signed) THOMAS S. SPATES,
U. S. Com'r, Dist. W. Va.

JAMES MARCH
vs.
THE MARTINSBURG AND POTOMAC RAILROAD COMPANY.

85 Know all men by these presents, that we, the Martinsburg and Potomac Railroad Company and Thomas B. Kennedy and Charles J. Faulkner, are held and firmly bound unto James March in the sum of five hundred dollars, to be paid to the said James March, his executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this thirteenth day of February, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas the Martinsburg and Potomac Railroad Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by District Court of the United States for the District of West Virginia, now the condition of this bond is such that if the above-named the Martinsburg and Potomac Railroad Company shall prose-
86 cute its said writ of error to effect, and answer all costs if it shall fail to make a good plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE MARTINSBURG & POTOMAC RAILROAD COMPANY.
By THOMAS B. KENNEDY, *Pres't.*
(Signed) THOMAS B. KENNEDY. [SEAL.]
(Signed) CHAS. J. FAULKNER. [SEAL.]

Approved by
(Signed) M. R. WAITE,
Chief Justice U. S.

April 28th, 1882.

A copy. Test:
JASPER Y. MOORE,
Clerk D. C. U. S., D. W. V.

87 { 5c. Inter. Rev. Stamp. } { Aug. 7, 1871. }

MARTINSBURG AND POTOMAC RAILROAD COMPANY.

Contract for Grading and Masonry.

Article of agreement made and concluded the 29th day of December, in the year eighteen hundred and seventy, between James March, of Lebanon county, Pa., of the one part, and the Martinsburg and Potomac Potomac Railroad Company, by their president, of the other part, whereby it is covenanted and agreed as follows, to wit: The said James March hereby covenants and agrees he will furnish all the material required, which shall be of a sound, durable, and good quality and approved by the chief engineer in the employment of the said company, and perform all the labor necessary to construct and finish in every respect in the most substantial and workmanlike manner the grading and masonry for the section between Powell's Bend and Martinsburg, of the Martinsburg and Potomac Railroad.

The construction of said section to include all its appurtenances, and shall be in all respects according to the following specifications:

Specifications

of the manner of constructing the general work—grading and masonry, clearing and grubbing timber from the spaces required for the excavations for the railroad and for the foundation of cul-
88 verts and other appurtenances for said road; all trees, bushes, and roots shall be cut and grubbed up, and, together with logs, brush, and wood of every description, shall be removed from the ground and so disposed of as to do no unnecessary damage to the adjoining lands, as may be directed by the said chief engineer.

It is understood, however, that roots are not to be grubbed for the foundation of embankments where the natural surface of the ground is more than four feet below the grade level, and of such solidity as not to require excavations for foundation; in such cases the trees are to be cut close to the ground as removed, as before specified.

Excavations.

1st. When directed by the aforesaid engineer, all vegetable or perishable matter shall be excavated from a space of such width as may be required under the embankments, and removed into the outside of the bank, or if directed, beyond the limits of the bank; and this work shall be always one hundred feet in advance of the embankment.

2d. Excavations for the foundations of culverts and other structures for side draining for channels to conduct the water of streams or land floods to or from culverts, or to change the course of streams, and for the approaches of roads that may cross or pass alongside of

said railroad, and for sidings, branches, depot grounds, water stations,
and all other excavations that may be connected with or inci-
89 dent to construction of said railroad, shall be performed in all
respects as may be directed by said engineer.

3d. In all cases where the grade line of the railroad passes below the natural surface of the earth, or where material is wanted for embankments, the same shall be excavated in the manner described below.

4th. Earth cutting, where required for the prism of the railroad, the earth shall be excavated to the grade level, true and even, to a width of not less than fifteen feet nor more than ten feet each way from centre line of railroad, with such slopes as may be directed by said engineer. Where the natural soil, or earth immediately below the grade level, is not suitable for a road bed, it shall be excavated to such additional depth as said engineer may direct.

All the material on the section excavated from earth cuttings, except stone suitable for walls or foundations, as hereinafter specified, shall be deposited and used in the formation of embankments on the same section. The embankments, except in cases where it may be otherwise directed, shall be raised to grade level of the railroad, and be formed to such width and slopes as said engineer may direct.

When the quantity of material taken from any excavation shall be greater than required to make the embankments of the usual
width, the surplus shall be deposited on one or both sides of
90 the embankments, in such manner as to increase their width
uniformly, or in such manner as the said engineer shall direct. In cases where the quantity of material furnished by the excavations upon the section shall not be sufficient for the formation of the requisite embankments, the deficiency shall be supplied by material taken from the adjacent grounds, at such place or places as said engineer may designate, or from an enlargement of the excavations made in a regular and even form with proper slopes, as said engineer may direct.

Protection Walls.

1st. Foundation walls will rest upon the rock and be laid dry, and the style of workmanship shall be such as is usually required for good slope walls, well banded and laid in a compact and substantial manner; and so far as may be required by said engineer, the beds of the stone shall be laid at right-angles to the face of the wall. The protection wall is to be carried forward of the embankments.

Masonry.

Culverts.—Those of not more than two feet in width of opening shall be rectangular or box culverts; they shall be covered with rough-dressed stones, to be not less than six inches in thinkness, two feet nine inches in length, and eighteen inches wide.

Culverts of four feet and over in span or width, are to be arched.

91 The abutments, piers, arches, spandrels, parapets, and wing walls to conform to the plans that may be furnished by the engineer. The masonry to be laid in a neat and compact manner and well banded; no stone to be used in the face that is less than ten inches thick, twenty inches long, and that will not bed twelve inches in the wall. Stone in all cases to be laid on their broadest bed, and no stone to have more height than bed. The arch stone is generally to have such depth as to lay the full thickness of the arch, and their beds conform to the radii of the arch. Coping stone to be got out in such form as will allow the upper surface to be in fair line with vertical joints of not more than half an inch in width; no stone to be less than nine inches in thickness, nor have a superficial area of less than six feet. The culvert masonry shall be laid in mortar, composed of one part of best hydraulic cement and two parts of clean sand; no mortar that has been made more than one hour shall be put in the masonry.

Bridge masonry will be composed of abutments and supporting walls. The face and other stones to be sound and compact, and of a quality to endure the frost and sun, such as shall be approved by the engineer; they shall be laid upon their natural beds, and

92 fitted to their places before they are brought upon the wall; and in order that the stone be properly laid, cranes shall be used in handling them upon the walls and in laying them.

All the face stones shall be well hammer-dressed on their face, in their beds, and in their joints; in other words, the beds, the joints, and the face shall fill the square, and be as complete as the beds, joints, and face of cut stone in every respect, except the faces being hammered instead of cut.

There shall be a header or band stone four feet long for every ten feet in length on each course, measured from center to center of the headers. The headers of any course shall divide, as nearly as possible, the space between the headers below.

No course shall be less than ten inches in thickness, and no stretcher shall have less than twelve inches bed.

No smaller course shall precede a larger; the thicker course shall be laid at the bottom.

The stretchers shall not be less than three feet long, and their ends shall not make *end* even and full joint of less than nine inches in from the face of the wall. When said engineer may direct, eighteen inches of the face of the whole wall shall be laid in mortar, the same as provided for in culverts. If arches are required in any bridge masonry, the work shall be done in conformity to the specifications for similar work in culverts. In all fillings around

93 masonry or other walls care shall be taken to use, as far as possible, small stones, spalls, quarry chips, gravel, or such other material as shall be approved of by said engineer, and so to arrange them as to lessen the pressure of earth against the walls,

and also to facilitate the escape of water that might otherwise be retained to the prejudice of the masonry.

No hydraulic cement to be used until it shall have been tested and approved by the said engineer. All masonry to be carried up in a regular manner, and levelled off in courses of not more than eighteen inches in height, if required by said engineer. Stone used in masonry shall be of a sound and durable quality, and free from dirt. It is mutually agreed that the said company shall furnish the right of way over the said section of railroad, and make compensation to land owners for all excavations herein provided for that may be required for the work.

It is agreed that no public or private road that crosses or intersects the line of said railroad or its appurtenant works shall be obstructed by excavations or otherwise, until directions shall be given by said engineer to complete the railroad across said road or highway, nor shall any crops of grain, grass, or vegetables, nor fruit trees, nor dwelling houses, or other buildings on said line of road be
94 disturbed, unless by direction of said engineer.

The said contractor shall be responsible for all damage done to premises through which the line of said section of railroad runs, in consequence of leaving gates and fences open, and also for all depredations on woods, fences, or other property by workmen in his employ, or by blasting rock so as to damage buildings or other property, and no estimate of work shall be furnished by said engineer until all damages of this description are settled or provided for to his satisfaction.

And the said contractor hereby further agrees to perform the several stipulations of this contract by himself and workmen under his immediate superintendence, and not by a sub-contract, except it be with the written approbation of the said engineer.

And it is further agreed that if at any time any overseer or workman employed by said contractor shall be unfaithful, incompetent, or shall have made exertions to produce disturbance on this or any other contract on the said road, the said contractor shall, on being required by said engineer, forthwith discharge such person, and not employ him on the work, nor shall the said contractor employ any other person who may have been dismissed for similar cause on any part of the line of said road.

And the said contractor hereby agrees that he will perform
95 the work under this contract, as before specified; but any alterations in the form, dimensions, or materials of said work, which may be directed in writing by said engineer, shall be made by said contractor as directed.

And if in the opinion of said engineer it will be expedient to dispense with the whole or any part of the work hereby contracted for, the contractor, on receiving directions, shall discontinue any arrangements or progress on the work so directed to be dispensed with, but the said contractor shall be entitled to such compensation as said

engineer may estimate to be just and reasonable for any outlay or progress he may have made for work so dispensed with.

It is further agreed that if in the opinion of said engineer it shall be expedient to make alterations in the location of the line of road on said section, the contractor shall conform to such alterations; but if the work shall be rendered thereby more expensive in kind, he shall be entitled to such extra compensation as said engineer shall estimate to be just and reasonable; and if such alterations shall make the work less expensive in kind, then a deduction shall be made, as said engineer may estimate to be just and equitable.

To prevent all disputes, it is hereby mutually agreed that the said engineer shall in all cases determine the amount or quantity
96 of the several kinds of work which are to be paid under this contract and the amount of compensation at the rates herein provided for; and also that the said engineer shall in all cases decide every question which can or may arise relative to the execution of this contract on the part of said contractor, and his estimate shall be final and conclusive.

It is further agreed that all excavations shall be estimated as excavation, and the price paid for excavations shall include all expenses for depositing the same as provided for in the preceding specifications, except stone that may be used in the construction of walls. All excavations shall be included under two heads, namely, earth excavations, which will include all except rock, and rock excavations, which will include all ledges of sound rock and rock boulders measuring not less than half a cubic yard.

The compensation for arches is to include all expenses for centering and the removal of the same after the work is done.

It is further agreed that in calculating the quantity of masonry, walling, and excavation, the most rigid geometrical rules are to be applied thereto, any custom to the contrary notwithstanding; and the said company do hereby engage, that whenever this contract shall be wholly completed on the part of the said contractor, and the said engineer shall have certified the same, they will pay
97 for said work as follows:

For the excavation of earth, which includes clay, gravel, &c., thirty cents per cubic yard *yard*.

For solid rock, one dollar and thirty cents per cubic yard.

For slate rock, seventy-five cents per cubic yard.

For loose rock, fifty cents per cubic yard.

For embankment, thirty cents per cubic yard.

For bridge masonry, seven dollars per perch of twenty-five cubic feet.

For culvert masonry, seven dollars per perch of twenty-five cubic feet.

For dry drains, three dollars and fifty cents per perch of twenty-five cubic feet.

For vertical walls, three dollars and fifty cents per perch of twenty-five cubic feet.

For slope walls, three dollars and fifty cents per perch of twenty-five cubic feet.

For timber, including laying, 1 per liner foot.

In order to enable the contractor to prosecute the work advantageously, the said engineer shall make an estimate from time to time, not oftener than once per month, as the work progresses, of the work done; the said estimate shall not be required to be made by strict measurement on unfinished work, but by measurements and estimating, so as to obtain an approximate result of the work done and its value under this contract, as compared with the whole contract; but it shall not be required of said engineer to measure at all for work that is in an irregular form, but may estimate on his
98 judgment of the value of the same; nor shall it be required to make an estimate oftener than once in each and every month after the work is commenced.

The company will pay in current money within twenty per cent. of the amount of said estimate on presentation.

And it is further agreed that if in the opinion of said engineer the said contractor shall neglect or refuse to prosecute the work embraced in this contract with sufficient energy to ensure its completion within the time specified in the same, or perform the work in an improper manner, the said engineer may certify the same to the board of directors of the aforesaid company; and thereupon the said directors may declare the said contract abandoned by said contractor, and may proceed to contract for the work with any other person.

On abandonment of this contract as aforesaid, the contractor shall forfeit to the said company any moneys that may remain due and unpaid at the time.

And the said contractor does agree that the work herein contracted for shall be commenced within twenty days after being required by the company or the said engineer, and that this contract shall be fully completed on his part by the first of April, 1872, and sooner if practicable. And it is further agreed that whenever this con-
99 tract shall be completedly performed on the part of the said contractor, and the said engineer shall certify the same in writing under his hand, together with his estimate as aforesaid, the said company shall within thirty days after the receipt of said certificate pay to the said contractor, in current notes, the sum which according to this contract shall be due. Provided however, and is so distinctly understood and agreed, that the said Martinsburg & Potomac Railroad Company may pay to the said James March two-fifths, or forty per cent., of every estimate which it is required and called upon to pay in bonds of the county of Berkley, to be taken and received by the said March at their par value.

(Signed) CHAS. J. FAULKNER.
Pres't of M. & P. R. R. Co.

his
(Signed) JAMES × MARCH.
mark

Witness—
(Signed) EDWARD WATTS.
(Signed) J. S. HALDEMAN.

Proposals.

100 I propose to furnish all the necessary materials and construct section from south bank of Potomac River to Martinsburg, of the Martinsburg & Potomac Railroad, and do all the necessary excavation, embankment, &c., in conformity with the foregoing contract and specifications, for the following prices:

MARTINSBURG, *December* 27, 1870.

For grubbing and clearing the roads.
For the excavation of earth, which includes clay, gravel, &c., 30c. per cubic yard.
For solid rock, $1.20 per cubic yard.
For slate rock, 75c. per cubic yard.
For loose rock, 50c. per cubic yard.
For embankment, 30c. per cubic yard.
For bridge masonry, $7 per perch, 25 (c. ft.)
For culvert masonry, $7 per perch.
For dry drains, $3.50 per perch.
For vertical walls, $3.50 per perch.
For slope walls, $3.50 per perch.
For timber, including laying per linear foot.
For ballasting the roads, $1 per perch.
The above prices include all pumping or bailing of water during the progress of the work.

(Signed) JAMES his + mark. MARCH.

Witness—
(Signed) EDWARD WATTS.
(Signed) J. S. HALDEMAN.

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I propose to furnish all the necessary materials and construct section from south bank of Potomac River to Martinsburg, of the Martinsburg & Potomac Railroad, and do all the necessary excavation, embankment, &c., in conformity with the foregoing contract and specifications, for the following prices:

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For vertical walls, $3.50 per perch.
For slope walls, $3.50 per perch.
For timber, including laying per linear foot.
For ballasting the roads, $1 per perch.
The above prices include all pumping or bailing of water during the progress of the work.

(Signed) JAMES his + mark MARCH.

Witness—
(Signed) EDWARD WATTS.
(Signed) J. S. HALDEMAN.

114 374

JAN 30 1885
CLERK.

No. 605. *October Term, 1883.*

In the Supreme Court of the United States.

The Martinsburg and Potomac Railroad Company, Plaintiff in Error,

vs.

James March, Defendant in Error.

Error to the District Court of the United States for the District of West Virginia.

BRIEF OF ARGUMENT FOR PLAINTIFF IN ERROR.

WAYNE MacVEAGH,
For Plaintiff in Error.

Allen, Lane & Scott, Printers, 229-231 South Fifth Street, Philadelphia.

In the Supreme Court of the United States.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

The Martinsburg and Potomac Railroad Company	October Term, 1883.
vs.	No. 605.
James March.	

BRIEF OF ARGUMENT FOR THE PLAINTIFF IN ERROR.

The plaintiff in error was the defendant below in an action brought by James March, a contractor, for a balance alleged to be due from the Martinsburg and Potomac Railroad Company on a contract for the construction of the latter's road, entered into by the respective parties.

The transcript of record will show a series of pleadings following upon the commencement of the action, succeeded by a trial of the cause and a verdict for the plaintiff. The defendant in the course of the pleadings demurred to the declaration and to the several counts therein, and at the trial presented a number of instructions to the court for its submission to the jury. The action of the court in overruling the demurrers and in refusing the instructions asked for has furnished the basis for the writ of error to this court.

Two series of legal questions, therefore, arise for consideration here. First, Whether, according to the law of correct pleading, the court erred in overruling these demurrers of the defendants; and secondly, Whether the court erred in refusing to submit to the jury, as the law governing the contract of the parties, the instructions offered by the defendant. These questions will now be considered in their order, the errors which it is believed the court below committed in its charge to the jury being embodied in twelve bills of exceptions, to which, *ad seriatim*, attention will be duly directed.

The plaintiff sued in *assumpsit:* In the first count of his declaration he counts specially upon the contract, setting out the same in full. The other counts in the declaration are the ordinary counts of *indebitatus assumpsit.* On page eleven of the record are found the demurrers of the defendant to the declaration and to each count thereof, the joinder in the demurrers by the plaintiff, and upon the same page the judgment of the court below overruling the demurrers.

The court practically committed no error in overruling the demurrer to the declaration as a whole, as, under the practice in West Virginia, if there is one good count in the declaration it would be sufficient, and the *indebitatus* counts were sufficient. In this case, however, there was a demurrer to each count, and therefore, if any one of the counts was defective, the court erred in overruling the demurrer to that count.

We submit that the first, or special count on the contract, was defective in substance, and under the pleading of the plaintiff showed no cause of action against the defendant.

On page seven of the record, the plaintiff alleges that under the contract with the defendant, "it was further agreed that "whenever the said contract should be completely performed "on the part of the said plaintiff, *and the said engineer should "certify the same in writing under his hand, together with his "estimate as aforesaid*, the said defendant should, within thirty "days after the receipt of each certificate, pay to the plaintiff, "in current notes, the sums which, according to said agree-"ment, should be due."

We submit, that this allegation of the declaration shows, first, that the covenant of the defendant to pay depended upon the existence of certain facts; and that, secondly, the happening of these facts constituted a condition precedent to the liability of the defendant to pay.

It is almost useless to cite authority to show that the covenant of the defendant to pay, depended upon the performance of certain acts of the plaintiff and the engineer of said company. Covenants are to be considered to be dependent or independent of each other, according to the intention and meaning of the parties, and even technical words should give way to such intention.

The rule established in Thomas *vs.* Cadwallader, Willes, 496, has ceased to prevail. The opinion expressed in Kingston *vs.* Preston, Douglass, 689, has now become the rule: 8 T. R., 371. In the case of Richie *vs.* Atkinson, 10 East, 306, Lord Ellenborough says it depends "not on any formal "arrangement of the words, but on the reason and sense of "the thing, as it is to be collected from the whole contract, "whether of two things reciprocally stipulated to be done, "the performance of the one, does in sense and reason depend "upon the performance of the other." This is now the established doctrine in England and the United States. Pordage *vs.* Cole, 1 Saund., 319, note 4; 40 E. C. L. R., 364; 44 E. C. L. R., 112; 69 E. C. L. R., 912; Tilston *vs.* Newell, 13 Mass., 406; Watchman *vs.* Crook, 13 Gill and J., 255; 13 How., 339; 10 Johns., 205; Brokenbrough *vs.* Ward's Adm., 4 Cranch, 355; 9 Grattan, 165; 2 Wash. Cir. Ct., 459.

That the language quoted created a condition precedent to the liability of the defendant to pay, is equally clear. If the agreement, as in this case, provides that one party shall do an act, or some other event shall happen, and that for the doing thereof or on the happening of said event, the other shall pay a sum of money, the doing of the act or the happening of the event is a condition precedent to the payment: 1 Salk., 171; 1 Ld. Raym., 605; 1 Chit. Pl., 280. As stated by Judge Moncure in delivering the opinion of the court in the case of Camden *vs.* South Side R. R. Co., 14 Grattan, 309: "The

"making of a final estimate was a condition precedent to the "right of action."

The covenant of the defendant to pay being dependent upon a condition precedent, was it not essential that the pleader, in framing the first count of the declaration, should have averred performance of said condition? This proposition must strike the legal mind as one about which there can be but one opinion. Gould on Pleading, ch. 4, section 13, page 163, lays down the doctrine: "That whenever, therefore, the right of recovery "depends upon a condition precedent, the declaration must aver "performance of it, or what is equivalent to performance, to en- "title the plaintiff to recover, for in every case performance of "the condition, or what the law holds equivalent to it, is a con- "stituent and indispensable part of the right of action, or that "without which there can be no cause of action." Where there is a condition precedent, however improbable the thing may be or difficult to be performed, performance must still be averred, as when there is a stipulation for the act of a third person: 6 T. R., 710-719; or, as expressed by Professor Minor, vol. 4, part 1, page 579 of his Institutes: "When the "defendant's obligation to perform his contract depends on an "event which would not otherwise appear from the declaration "to have occurred, it is obvious that an averment of such event "is essential to a logical statement of the cause of action, and "ought to precede the statement of the defendant's breach of "his promise; as, for example, of the performance or excuse "for non-performance, of a condition precedent, or of the hap- "pening of any event material to the cause of action."

A number of cases may be cited in illustration of this principle, and which bear directly upon the question involved in the demurrer to the first count in the declaration. The case of Smith *vs.* Briggs, 3 Denio, 76, was a suit upon a contract containing a provision requiring that a strict performance by the contractor of the work under the contract should be certified by the architect, and to which declaration there was a demurrer. The court there held that the receipt by the defendant of said certificate was a condition precedent to the plaintiff's right to recover, and that as the declaration failed to aver

that such certificate had been received, it was bad on demurrer.

The same principle was announced by Justice Nelson in the case of McDonald *vs.* Hobson, 7 How., 757. He says: "The pleader has failed to comprehend the legal effect of the "agreement, and has failed to set out any cause of action in "the declaration."

In the case of Kennaird *vs.* Jones, 9 Grattan, 183, the judge, in announcing the opinion of the court on a demurrer to the declaration, held that "by the terms of the contract between "plaintiff and defendant the price of the logs in controversy "was not to be paid until they were floated up to the landing, "and to entitle the vendor to recover he must aver that the "logs had been floated up to the landing, or an excuse for the "failure."

In the case of B. & O. R. R. Co. *vs.* Polly Woods & Co., 14 Grattan, 460, in discussing a provision of the contract in that case, similar to the one involved here, the court uses the following language: "The provisions for the final estimates in "this case, then, created a valid condition precedent to the "payment of the balance appearing to be due to the plaintiff;" and on page 464 it says, "whereas in the latter case the final "estimate is itself a part of the cause of action, and a condition "precedent, the performance, or a sufficient excuse for the "non-performance, of which must be shown by the plaintiff "to maintain his action."

See also 3 Rob. New Practice, 571–580; 9 Peters, 319; 2 W. Va., 116; 69 Penn., 489; Rorer on Railroads, vol. 1, page 464; 1 Munf. (Va.), 487; 3 *Id.*, 255; 4 *Id.*, 352; 2 Metcalf, 501.

And when it is necessary, under the rules of pleading, to aver that the condition precedent was performed, it must be set out with such particularity as to enable the court to judge whether the intent of the covenant has been fulfilled. 4 Wend., 553; 8 B. Monroe, 281; 3 Robison's New Practice, 577.

The authorities also hold that when the defendant's covenant to pay depends upon some act to be done or forborne

by the plaintiff, or on some other event, the plaintiff must aver the fulfillment of such condition precedent, whether it were in the affirmative or negative, or to be performed or observed by him, or by the defendant, or by any other person, or must show some excuse for non-performance. A general averment of performance will not be sufficient, or, as stated in Butler *vs.* Tucker, 24 Wend., 449: "When the plaintiff has stipulated "that the work and material should be done and completed to "the satisfaction of arbiters, it is not sufficient for him to say "that he has performed the agreement in all respects, without "alleging that he has done it to the satisfaction of the arbiters "agreed upon between the parties." 1 Chit. on Pl., section 329, and notes; 16 Grattan, 295; 2 Pick., 203.

The contract set out in the first count required three events to happen before the liability of the defendant to pay was fixed by its terms: First, that the contract should be completely performed on the part of the plaintiff; secondly, that the engineer should certify the same in writing, together with his estimate of the amounts done; and thirdly, that thirty days should elapse after the receipt of such a certificate by the defendant. These are the conditions precedent upon which the liability of the defendant rests. Has the pleader in framing the first count averred in accordance with the principles established by the authorities hereinbefore quoted, the performance of said conditions? On page seven of the record he attempts to do so by saying that he "in all things complied with the conditions of the said "contract on his part." He also avers that he performed labor and furnished material which was accepted by the said defendant through its said engineer, and then avers a general performance on his part. This does not bring the count within the principles laid down. He utterly fails to aver that the engineer ever certified to the defendant that the work under the contract had been completely performed, or that the estimate under his hand had ever been rendered, or that thirty days had expired after the receipt of such certificate, nor has he alleged that the engineer refused to make such certificate,

or that the certificate rendered was fraudulent. In no allegation has he shown any excuse for the non-performance of the condition precedent to his right of action.

The court in Kennaird *vs.* Jones, 9 Gratt., 188, announces the doctrine that such a defect is reached by a general demurrer for the reason "that in the absence of any such alle-"gation, it seems impossible to say that the plaintiff shows a "perfect right to demand and receive the price." On the same point see 3 Rand., 68.

We therefore submit that it was error to overrule the demurrer to the first or special count in the declaration.

We shall not advance any argument in support of the special plea marked A A, found on page twenty of the record, as the authorities in Virginia and West Virginia support the proposition that the defense therein made, is embraced within the general issue of *non assumpsit* and that under such circumstances, it was not error in the court to reject the plea.

We will now proceed to the consideration of the exceptions taken to the rulings of the court upon the law of the case.

BILL OF EXCEPTIONS NUMBER ONE.

This bill, embraces instructions one, two, four and seventeen, asked by the defendant, and granted by the court, after first modifying the same by inserting in each after the words "fraud and intentional misconduct," the words "or gross mis-"take," to which modification the defendant excepted.

The use of the term "or gross mistake," without any qualifying language, inserted in the four instructions found on pages thirty-one and thirty-two of the record, cannot be sustained by the adjudications of the courts when construing the extent and effect of the finality and conclusiveness of similar provisions found in like contracts.

The term "gross mistake," as inserted by the court in the instructions prayed for, announces this proposition of law:—That if the jury believe from the evidence that the engineer, chosen by the parties to determine the amount and quantity

of the several kinds of work, and to decide every question, which could or might arise relative to the execution of the agreement, had committed a "gross mistake" either in computation or in the exercise of his judgment and discretion in the classification of the several kinds of work, coming within the terms of said contract; or in deciding any other question, relative to the execution of the contract, which depends upon judgment and discretion, and not merely upon calculation, in other words, had committed an error of judgment, that the error thus committed, was equivalent to fraud or intentional misconduct, on the part of the judge, to whom the parties mutually agreed to refer all questions of law or fact for decision; and that even in a court of law, such "gross mistake," would destroy the conclusiveness of the award.

This modification of the court does not assert the principle contended for by some of the authorities, that "gross mistake" in the final estimate may be considered with other evidence by the jury, as bearing upon the good faith of the arbiter in making his award, but announces the doctrine, that if a "gross "mistake," either in quantity or classification, has been made by the engineer, no matter how honest his purpose; no matter how competent; no matter how painstaking, careful or anxious they may find he has been in the execution of the duty devolved upon him by the contract; the fact alone, that in the opinion of others, he has committed an error of judgment, of discretion, or of opinion which they regard as gross, will at law, render void his otherwise conclusive estimate.

If this is law, the value of such a provision in similar contracts is absolutely destroyed by judicial construction, as it would be difficult to find a single case in which two experts might not greatly differ upon the subject of classification of material. As expressed by Judge Moncure in the case of Condon *vs.* South Side R. R. Co., 14 Grattan, 312, when speaking of the claim in that case, that the different kinds of material under the head of excavation were not properly classified: "But was it not for the engineer to decide under which of "the heads enumerated in the contract the said rock should "be classified? Was not this one of the disputes arising under

"the contract, which he was expressly authorized to deter-
"mine; and can this court, even though it may differ with
"him in opinion, revise and reverse his decision? If they did
"differ with him, they could only say as did Baron Parke in
"Faviell *vs.* R. R. Co., 2 Wels., Hurl. & Gord., 346, 'it is
"'simply a case of erroneous decision; and if parties choose
"'to refer a matter to a judge of their own selection, they are
"'bound by his decision, both in fact and law.'"

We conceive, that the most liberal view that can be taken of this question in favor of the defendant in error is announced by Rorer on Railroads, vol. 1, page 462: "The full and fair "decision of the engineer, timely made, as to the quantity and "quality of the work, and the amount payable, is not only "binding, except it involve a mistake of calculation, as is the "award of an ordinary arbitrator. In short, except for fraud "or mistake in matter of computation, it is final." The learned author then proceeds to discuss the principle upon which this doctrine is based, and sustains it upon both reason and authority. See Herrick *vs.* Belknap's Estate and the Vt. Cent. R. R. Co., 27 Vt., 673; Vanderwerker *vs.* Vt. Cent. R. R. Co., 27 Vt., 130; Reynolds *vs.* Caldwell, 51 Pa. St., 298.

These authorities maintain the following propositions: First, that fraud on the part of the engineer will render void the final estimate. Second, that an honest mistake in the matter of computation or calculation will have like effect. The first proposition admits of no dispute. Fraud in this, as in all cases, even of the highest solemnity, destroys its own creation. The second proposition excludes all mistakes which are the result of errors of judgment or discretion, and rests alone upon errors of computation. The learned author of Redfield on Railways, ch. 116, section 2, page 208, fully sustains this view. He says: "Relief can only be had in a court of "equity upon ground of fraud or obvious mistake, which "*latter* is held to apply rather to the quantity than the qual-"ity of the work, this being purely matter of judgment and "discretion, and which was intended to be concluded by the "opinion of the arbitrator."

In the case of Wilson *vs.* York and Maryland Railway Co.,

11 Gill & Johns., 58, the court, in passing upon the question of errors in the final estimate, draws a clear distinction between errors arising from the "gross negligence" of the engineer, and fraud in making his estimate, announcing what we conceive to be the true distinction applicable to the case cited, as well as to the one now under discussion, to wit, that gross negligence is not fraud, but may be considered by the jury as one among other elements tending to show fraud.

The courts of Virginia do not go as far as the authorities hereinbefore quoted. The question of mistake in the final estimate of an engineer, arose in the case of B. & O. R. R. Co. *vs.* Polly Woods & Co., already cited. In that case the defendant submitted an instruction, on the trial of the cause in the inferior court, which announced the proposition of law, that unless fraud or intentional misconduct was proven in the making of the final estimate, the same must be considered as conclusive between the parties. The court refused to grant the instruction as asked, but gave it, with the following modification: "Unless there is error apparent on the face of the "estimate."

The appellate court, in passing upon this modification, held that the inferior court had erred in making it to the prejudice of the defendant, and that the instruction as asked by the defendant, correctly propounded the law, and should have been granted. This case affirmed the same doctrine announced in Kidwell *vs.* B. & O. R. R. Co., 11 Gratt., 676.

This proposition was further reasserted by the same court in the case of B. & O. R. R. Co., 14 Gratt., 479.

The first instruction, page thirty-one of the record, is in substance the same as formulated by the distinguished judge who delivered the opinion of the court, in the case last before cited, as found on page 487, and is almost word for word taken from the third instruction of the defendant, refused by the inferior court, but sustained on appeal, as correctly announcing the law. See page 482. Although the appellate court disapproved the instruction granted by the court, in lieu of those asked by the defendant, its disapproval rested upon the phraseology of the court's instruction, its length, and its tendency to

confuse the jury; while on page 487 it approved the principles contained in it, if given as separate propositions. One of the principles announced by the court, and which bears directly upon the proposition now being considered, was: "That it "is not competent by extraneous proof, to show mere error of "classification, or ascertainment of quantity."

If the authorities hereinbefore referred to correctly announce the law governing and controlling the conclusiveness of the final estimate, the lower court in this case erred in inserting after the words "fraud or intentional misconduct" the words "gross mistake," without qualifying the modification made by the court, by confining the term "gross mis-"take" to errors of computation or calculation, so that the jury could not have embraced what it may have supposed to have been errors of judgment and discretion on the part of the engineer.

Bill of Exception Number Two.

Instruction Number Five.—The defendant in this instruction asked the court to instruct the jury, that as the contract required the plaintiff to furnish all the material for the grading and masonry of the road, they must exclude the item of stone purchased from Criswell and Zone used in the masonry of said road, although obtained beyond the limits of the same.

This instruction was modified by the court by adding to it, that if the purchase was made by direction of the company's engineer, and was not repudiated by it, although they had no other notice of said purchase, then they must find for the plaintiff. The defendant then asked a further modification of said instruction, to wit: That if the defendant had no notice of the order of the engineer, and never assented to the purchase, that his order was unauthorized and not binding on the company.

We apprehend that the court erred both in modifying the instruction offered and in refusing the modification to the instruction granted.

This bill presents the question, whether an assistant engineer has the right to annul the express terms of the written contract between the parties, and to make a new contract, based upon no consideration whatever; and in this case, to release the plaintiff from an express covenant with the defendant.

It is part of the elementary law of agency that for a principal to be bound by the contract of an agent, the contract must be within the authority committed to that agent, and the authority must be strictly followed. If the agent's acts vary substantially from his authority in nature, extent or degree, they are void as to the principal and do not bind him: Story's Agency, sections 167–170; Comyns' Dig., Atty., C. 11–15.

It is also a well-established rule that if the power of an agent be given by a written instrument, which instrument is known to the party contracting with him, such instrument must be followed strictly, and the power given by it cannot be varied or enlarged by evidence of usage: 1 Parsons on Contracts, section 59; Delafield *vs.* State of Illinois, 26 Wend., 192; Gardner *vs.* Balie, 6 T. R., 591; Hogg *vs.* Smith, 1 Taunt., 349.

Now it would seem that independent of a written agreement designating the engineer's powers, he would at no time, by virtue of his position, be authorized to bind the company as would some of the other executive officers of the company, whose special duty it is to enter into contracts for the company. An engineer's powers, though large and liberal in their scope, are not at all commensurate with or similar to those of the board of directors.

But where his authority is constituted and, in a measure defined by a written agreement whose terms are too plain to be misleading, parties dealing with him are not only prohibited from considering him as an agent of general powers, but they are absolutely bound to consider him as agent only for the limited powers designated in the instrument.

The contract entered into in this case gave to the engineer no power to bind the company to pay for material furnished. Such power would have been equivalent to an authority to

modify the contract itself, which, if it contemplated anything at all, contemplated that the contractor should furnish the material in question.

On page fifty of the record is found the clause, defining the engineer's duty in the premises: "He shall ascertain the "amount or quantity of the several kinds of work which are to "be paid under this contract, and the amount of compensa-"tion at the rates therein provided for."

The plaintiff having executed this agreement, had actual knowledge that it was his duty to furnish the material, and of the extent of the power of the engineer. The price of masonry provided for by the contract included the value of the material which the plaintiff had agreed to furnish at his expense. It was a matter of indifference to the defendant, whether the stone for the masonry was obtained by the plaintiff beyond, or on the limits of the right of way. Judge Moncure in the case of Condon *vs.* South Side Railroad Co., *supra*, clearly and forcibly lays down the rule that should have governed the court in granting or refusing the said instruction. "He (the "engineer) cannot set aside or disregard the contract of the "parties. That contract must furnish the law of the case. He "cannot alter the prices thereby ascertained, even though he "may consider them too high or too low; if it should appear "that he did so, his act would undoubtedly be void."

If the law laid down by the lower court in this case is correct, the decision of the Court of Appeals of Virginia is not law, as, under the instruction given, the price of masonry over the contract price, is to be increased, by the cost of the stone, to the amount of $558.70. See record, page nineteen. Herrick *vs.* Belknap, 27 Vt., 673; Starkey *vs.* DeGraff, 22 Minn., 431; 18 Am. Ry. Rep., 444, sustain the same doctrine as announced in Condon *vs.* South Side R. R. Co.

Bill of Exceptions Number Three.

Instruction number twenty.—The modification made by the court in this instruction represents the same proposition as that discussed under bill of exception number one.

Bill of Exception Number Four.

Instruction number sixteen.—This instruction clearly presents and sharply defines the distinction between mistakes of calculation or computation and errors of judgment and discretion committed by the engineer. It announces the proposition, that as to mistakes of judgment, the final estimate is conclusive between the parties, unless the engineer knowingly and willingly disregarded his duty; in other words, unless the final estimate was fraudulent. We refer respectfully to the authorities cited in discussing bill of exceptions number one to sustain the correctness of this instruction.

Bill of Exceptions Number Five.

Instruction number eight.—In considering this bill of exception, a question of practice is involved. If the practice in the Federal courts is the same as in the courts of West Virginia, to wit, that each bill of exception must present the evidence, to show the error of the court in refusing an instruction, as held in Dunlap *vs.* Monroe, 7 Cranch, 270, Chaffee *vs.* Borton Belting Co., 22 How., 217, it is unfortunate that the bill of exception does not show that a final estimate had been made by the chief engineer, and that he had included the pier masonry in the same, under the head of bridge masonry. If these facts had been stated it would have shown that the engineer exercised his discretion and judgment under the terms of the contract referring all matters of dispute to him, and the several kinds of work done in pursuance of said agreement. Another very important fact has been omitted in this exception, to wit, that the monthly estimates returned by the engineer classified the said masonry as bridge masonry, and was acquiesced in by the plaintiff. This last does not appear in the record. The case of Kidwal *vs.* B. and O. R. R. Co., 11 Gratt., 688, with the authorities there relied upon, fully sustains the correctness of instruction number eight, if the facts hereinbefore mentioned had not been omitted. But is instruction number eight-and-a-half, given by the court in lieu of number eight,

correct? We apprehend that if pier masonry is to be regarded under the instruction of the court and the finding of the jury as different from bridge masonry, the clause of the contract on page forty-nine of the record must be held to announce the law which should govern in this case, to wit: "But any alter- "ation in the form, dimension or material of said work which "may be directed in writing by said engineer, shall be made "by said contractor as directed." If this clause of the contract controls this alteration in the work, instruction number eight-and-a-half is erroneous in not inserting the words "the "written" in the said instruction before the expression "direc- "tion of the company's engineer." The instruction would then read: "But if the jury further find from the evidence that "the contractor, by the written direction of the company's "engineer." Was it not error, therefore, to have omitted these words? Bridge masonry was provided for in the contract sued on. Can there be a question that the contract contemplated the erection of bridges with abutments, wing-walls and piers, including all of these several kinds of mason work under the general term of bridge masonry? The plaintiff was required by the contract to build the masonry according to several specifications therein contained. If, however, as the instruction suggests, there were changes or alterations in the "form, dimension or material" in the construction of the bridges which made it a different kind of masonry than that provided for in the contract; the only competent evidence under the provisions of the agreement to establish the liability of the company was the written directions of the engineer; and yet this instruction would permit the jury to consider any evidence, positive, circumstantial or oral, tending to show that the engineer authorized such alterations.

Bill of Exceptions Number Seven.

The same difficulty suggested in considering exception number five confronts us in considering this exception. The record shows no facts upon which the instruction on the plea of the statute of limitations is asked, except the items

and the dates attached to each, included as a part of the instruction. Of course, all items not embraced within the terms of the contract, if the dates alone can be relied upon as fixing the time when the cause of action accrued, would be barred under the five years' limitation. This would include the employment of men by Boyne from March, 1871, to December, 1871, and also all items of bailing water, if the contract and proposal had been made a part of the bill of exception, as under the terms of said papers any such charge was expressly excluded. All the other items fall within the authority of the engineer under the provisions of the contract, and were not therefore barred.

Bill of Exceptions Number Eight.

Instruction number three.—It is believed that the court committed an error in refusing this instruction.

An analysis of the instructions will more clearly present the point.

First.—That Walls and Boyne were dismissed by the defendant, when the road was partially constructed.

Second.—That the field-notes and cross-sections were taken away by Boyne.

Third.—That he refused to deliver them up, denying that he had such papers.

Fourth.—That he was subsequently employed by the plaintiff, and continued with him until after the final estimate.

Fifth.—That the plaintiff had full knowledge of these facts.

Sixth.—That the plaintiff made no effort, when the work was being remeasured, to have such notes and sections placed in the possession of the succeeding engineers.

Seventh.—That the plaintiff had notice of the final estimate, and asked no remeasurement, or revisal of said estimate.

Now assuming these facts to have been found by the jury, which this court must do, in passing upon the rejection of the instruction, the lower court was asked to instruct the jury that if, in their opinion, there were errors in the classification of the work, resulting from a want of access to the papers de-

scribed, such errors in classification do not affect the conclusiveness of the final estimate, provided,

First.—The engineer was in all respects competent.

Second.—That his estimates were made in good faith.

Third.—That the estimate so made was the result of a careful and diligent resort to all proper means and sources of information.

In express terms the instruction asked is limited to errors of judgment, and rests upon the good faith of the engineer in the performance of his duty. Under all the authorities cited, in considering exception number one, nothing under such a state of facts but bad faith or fraud on the part of the engineer could invalidate his final estimate.

Bill of Exceptions Number Nine.

Instruction number twenty-one, modified by number twenty-one-and-a-half.—We apprehend that it was error in the court to refuse instruction number twenty-one, and a still graver error in giving instruction twenty-one-and-a-half. The qualification found in the instruction given by the court, rests upon an entirely different proposition of law, than that submitted by the defendant.

The proposition of the defendant is, that although the alteration in the masonry was ordered by the engineer, yet if afterwards inspected and examined and the same embraced in the final estimate as bridge masonry, that such determination and judgment was final unless fraudulent. The modification of the court instructed the jury, that under the facts set forth, the estimate was final unless the "price and value of the ma-"sonry fixed and returned by the engineer was inadequate "and unjust to the contractor."

The defendant desired the jury to be informed that if the engineer had exercised his judgment in classifying said masonry, that it was conclusive of the question unless fraudulent, although ordered by him.

The court's modification excluded from the consideration of the jury, the right of the engineer to exercise his judgment,

and rested the qualification upon the inadequacy and injustice of the price and value of said work. It was clearly erroneous to instruct the jury that if they found the "price and value "inadequate as fixed and returned by the engineer," they were at liberty to presume fraud. The bill of exceptions embraces no evidence tending to show that the engineer fixed the "price and value of the masonry," but on the contrary sets forth the contract, which negatives such a state of facts. In other words, the court confounds the authority of the engineer to classify the several kinds of work, and assumes that he, instead of the contract of the parties, had fixed the price and value.

It was also error in law to say that although the engineer had classified the masonry correctly, yet, if in their judgment the price was inadequate and unjust, over which the engineer had no control, they were at liberty to presume fraud on his part, and disregard the final estimate. This proposition is irreconcilable with any facts in the case, or any known proposition of law advanced in it,

Bill of Exceptions Number Eleven.

Instruction number ten, modified by the court in number ten and-a-half.—The only objection to the modified instruction is, that it omits to inform the jury as requested, that the promise by the chief engineer to pay for pumping and bailing of water was in direct violation of the terms of the contract, and therefore was null and void, and without consideration or authority. This omission in the court's instruction, left the evidence of the promise of the engineer, before the jury, although made subsequent to the execution of the written contract as set out in said bill of exception, and it failed to express the opinion of the court upon the validity and binding effect upon the defendant of said promise. The instruction of the court rested upon the original contract, without any reference in it to the law applicable to the facts as set out in the bill of exception. In other words, the jury was unin-

formed whether the promise made in 1872 could, under the law, or could not, modify the original contract.

Bill of Exceptions Number Twelve.

We apprehend, that the authorities cited in discussing the demurrer to the declaration, fully and conclusively sustain the correctness of the instruction contained in this bill and show a manifest error committed in rejecting it. If it was error to overrule a demurrer to a declaration, because it failed to allege the performance of the conditions precedent to the right of action, it must be error on the part of the court to refuse an instruction, that was intended to inform the jury, that if certain items set out in the instruction, and which were included in the terms of the contract, had never been considered, brought to the attention of, or passed upon by the engineer, as to said items no foundation had been laid to support an action against the defendant, unless the jury found the final estimate was fraudulent.

From the above detailed consideration of the exceptions taken to the rulings of the court at the trial of the cause, it is plain that the two principal questions of law involved in the instructions asked of the court, and given to the jury, were:—

First.—Was the plaintiff entitled to recover, as to those items for which he obtained a verdict in his favor, without producing or proving the certificate of the chief engineer as to them in respect to the quantity or quality of the work done, or without showing that the said chief engineer had refused to act, or had acted fraudulently in reference to them? and

Secondly.—Could the defendant's engineer legally bind the company to pay for material purchased by the contractor, or an increased price for masonry, in opposition to or variation of the express terms of the written contract between the plaintiff and defendant?

It is confidently believed that these questions can receive their proper answer only in the negative, and that the court below erred in practically answering them in the affirmative.